

Whose Best Interests?: Custody and Access Law and Procedure

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Whose Best Interests?: Custody and Access Law and Procedure

Abstract

This article compares the law of custody and access disputes with the procedure used to resolve them. The author argues that there is a fundamental contradiction between the two. The former focuses on the interests of the children involved to the exclusion of everything else. The latter, however, is controlled by and designed to protect the rights and interests of the adult parties to the dispute. Despite their doctrinal centrality in custody and access law, children are usually silent and invisible in custody and access procedure. To resolve this contradiction, the author proposes a focus on the costs and benefits of litigation between parents for the children involved. As it stands, too much of the litigation that occurs between parents has more costs than benefits for them. Some of these cases should be curtailed, and the proportionality principle applied to others. Finally, children involved in custody and access litigation should have a stronger voice when decisions are being made about their future.

Keywords

Custody of children; Visitation rights (Domestic relations); Children--Legal status; laws; etc.; Canada

Whose Best Interests? Custody and Access Law and Procedure

NOEL SIMPLE *

This article compares the law of custody and access disputes with the procedure used to resolve them. The author argues that there is a fundamental contradiction between the two. The former focuses on the interests of the children involved to the exclusion of everything else. The latter, however, is controlled by and designed to protect the rights and interests of the adult parties to the dispute. Despite their doctrinal centrality in custody and access law, children are usually silent and invisible in custody and access procedure. To resolve this contradiction, the author proposes a focus on the costs and benefits of litigation between parents for the children involved. As it stands, too much of the litigation that occurs between parents has more costs than benefits for them. Some of these cases should be curtailed, and the proportionality principle applied to others. Finally, children involved in custody and access litigation should have a stronger voice when decisions are being made about their future.

Cet article compare la législation concernant les conflits en matière de garde d'enfants et de droit d'accès, et la procédure utilisée pour les résoudre. L'auteur fait valoir qu'il y existe une contradiction fondamentale entre les deux. La première met l'accent sur les intérêts des enfants en cause à l'exclusion de tout le reste. Toutefois, la dernière est contrôlée et conçue en vue de protéger les droits et les intérêts des parties adultes au litige. Malgré la centralité doctrinaire du droit en matière de garde d'enfants et de droit d'accès, les enfants sont habituellement silencieux et invisibles lors de la procédure relative à la garde d'enfants et au droit d'accès. Dans le but de résoudre cette contradiction, l'auteur propose de mettre l'accent sur les frais et les avantages du litige entre les parents à l'égard des enfants en cause. À l'heure actuelle, une trop grande partie des litiges survenant entre les parents présentent pour eux plus de frais que d'avantages. Certaines de ces causes devraient être suspendues et le principe de la proportionnalité devrait être appliqué aux autres. Pour finir, les enfants en cause dans les litiges de garde d'enfants et de droit d'accès devraient avoir une voix plus forte lorsque des décisions sont prises pour leur avenir.

I. LAW—THE BEST INTERESTS OF THE CHILD	290
A. Statute	292

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B.	Case Law	295
C.	Scholarship—Majority Support for BIC	298
D.	The Distinctiveness of BIC	300
II.	PROCEDURE—THE RIGHTS OF THE PARENT	301
A.	Parents Decide if the Procedure Occurs	303
B.	Parents Control Most of the Evidence	305
C.	Parents Decide When the Procedure Ends	306
1.	The Material Change Threshold	308
2.	The Vexatious Proceedings Threshold	310
3.	The Age of Child Threshold	313
III.	RESOLVING THE INCONSISTENCY	313
A.	Law Reform For Parents	314
1.	Scholarship: Minority Support for Parents' Rights or Interests	314
2.	The ALI's <i>Principles of the Law of Family Dissolution</i>	317
B.	Procedural Reform For Children	318
1.	Benefits for Children of Parenting Litigation	319
2.	Costs to Children of Parenting Litigation	321
3.	Why Litigating Parents may be Unreliable Balancers of Cost and Benefit	325
4.	Improving the Cost-Benefit Balance for Children	327
IV.	CONCLUSION	335

CUSTODY AND ACCESS DISPUTES arise when separated parents cannot agree on how to divide the ongoing rights and responsibilities of parenting.¹ “Custody” usually means the right to make decisions on behalf of a child and the right to have care and control of a child.² “Access” refers to the right to be with or communicate with a child and may also include the right to obtain information about a child.³ While most parents resolve custody and access disputes privately, a substantial number also pass through our courts.⁴ In 1998, proposals to amend

1. This article focuses on disputes between individuals after relationship breakdown, as opposed to adoption or child protection proceedings.
2. James G. McLeod, *Child Custody Law and Practice*, looseleaf (Toronto: Carswell, 1992) at § 1(1). These two meanings are sometimes distinguished as “legal custody” and “physical custody,” but usually an individual who has right to one of these two types of custody at a given point in time will also have the right to the other.
3. See e.g. *Children's Law Reform Act*, R.S.O. 1990, c. C.12 [*Children's Law Reform Act*]. The Ontario *Act* establishes the access parent's right to information at s. 20(5). The rights of custody and access are bundled with concomitant responsibilities for the child's welfare.
4. Ministry of the Attorney General (Ontario), *Court Services Division Annual Report 2008/2009* (Toronto: Ministry of the Attorney General, 2009) at 32. During the year ending in April 2009, there were 75,108 new family proceedings filed in Ontario's courts, excluding child protection matters. Statistics do not appear to be available on the proportion of cases that involved child-related issues, as opposed to those that were exclusively financial in nature.

the *Divorce Act* triggered a heated debate about joint custody and the allocation of parenting time.⁵ An apparent stalemate was reached in 2004,⁶ although occasional skirmishes continue.⁷ Other disputes now swirl around custody and access, with the issue of parental alienation surfacing most recently in the media.⁸

This article proposes to take a step back from these controversies and make a more general claim: there is a fundamental contradiction in the system the state uses to resolve custody and access disputes. The *law* focuses on the interests of the children involved to the exclusion of all else. However, the *procedure* by which the disputes are resolved primarily empowers the adult parties to the dispute. I will argue that this contradiction is worth resolving, and will suggest how this might be done.

However, the author asked judges and lawyers about the issue during a series of interviews. One family lawyer noted that 90 per cent of her cases involved a custody or access issue, and a judge at the Ontario Court of Justice said that in two years on the bench, she had only heard two cases where there was no parenting issue. In the Superior Court of Justice, child-related issues appear to be somewhat less ubiquitous, with one judge indicating that "easily half if not more" of the cases have them. Ethics approval was granted for the interviews by York University Human Participants Review Sub-Committee (Certificate Number 2009-161, granted on 25 November 2009).

5. R.S.C. 1985 (2d Supp.), c. 3 [*Divorce Act*]; Special Joint Committee on Custody and Access, *For the Sake of the Children: Report of the Special Joint Committee on Child Custody and Access* by Landon Pearson & Roger Gallaway (Ottawa: Senate and House of Commons, 1998); Marie Laing, "For the Sake of the Children: Preventing Reckless New Laws" (1999) 16 Can. J. Fam. L. 229; Nicholas Bala, "Report from Canada's 'Gender War Zone': Reforming the Child-Related Provisions of the *Divorce Act*" (1999) 16 Can. J. Fam. L. 163; Susan B. Boyd, "Can Child Custody Law Move Beyond the Politics of Gender?" (2000) 49 U.N.B.L.J. 157; and Linda C. Neilson, "Putting Revisions to the Divorce Act Through a Family Violence Research Filter: The Good, the Bad and the Ugly" (2003) 20 Can. J. Fam. L. 11.
6. Janice Tibbetts, "Martin Government Shelves Plan to Overhaul Divorce, Child-Custody Law" *The Ottawa Citizen* (6 February 2004) A1.
7. A number of private members' bills by Conservative MPs have sought to create an "equal parenting" presumption in the *Divorce Act* (e.g. Maurice Vellacott's Bill C-422, *An Act to amend the Divorce Act (equal parenting) and to make consequential amendments to other Acts*, 2d Sess., 40th Parl., 2009). However, the government has never introduced or endorsed any of these, and the minister of justice recently announced his opposition to the proposed change. See Cristin Schmits, "Federal AG Nixes Equal Parenting Presumption" *Lawyers Weekly* (28 August 2009).
8. See e.g. Susan Pigg, "Family Subterfuge Leaves Lasting Scars" *Toronto Star* (31 March 2009) E1; Kirk Makin, "Parental Alienation Cases Draining Court Resources" *The Globe and Mail* (13 May 2009) A8.

Part I focuses on the legal doctrine, to demonstrate the near-universality of the “best interests of the child” principle in statutes, case law, and normative scholarship. Part II turns to the procedure, asking who decides whether the procedure occurs, controls the evidence, and decides when the procedure ends. Part III will suggest two alternatives to resolve this inconsistency between doctrine and procedure. We might acknowledge the legitimacy of parents’ interests in custody and access disputes, as the American Law Institute (ALI) proposed to do in 2002.⁹ Alternatively, there may be ways to reform the custody and access dispute resolution procedure to better serve the best interests of the children involved.

I. LAW—THE BEST INTERESTS OF THE CHILD

The legal concept of “best interests of the child” (BIC) is the golden thread running through the Canadian law of custody and access. As this Part will demonstrate, statutes and case law have repeatedly and forcefully stated that the interests or rights claims of the adults involved in the dispute are not relevant. The golden thread of BIC is also woven into almost all of the normative scholarship about private parenting disputes. This Part will trace the thread to show the remarkable degree of consensus supporting BIC, before identifying the distinctiveness of this legal standard.

A preliminary question arises: what is meant by the “best interests of the child” in the context of a custody or access dispute? At the level of case-by-case decision making, judges often have great difficulty applying this standard.¹⁰ Determining what outcomes would be “best” for a given child, as Robert Mnookin aptly put it, “poses a question no less ultimate than the purposes and values of

9. American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (St. Paul: American Law Institute Publishers, 2002) at s. 2.08 – “Allocation of Custodial Responsibility” [American Law Institute]. See Part III(A)(1), below, for an account of this proposal.

10. Martin Guggenheim, *What’s Wrong with Children’s Rights* (Cambridge: Harvard University Press, 2005) at 153. See also the judgment of L’Heureux-Dubé J. in *Young v. Young*, [1993] 4 S.C.R. 3 at para. 71 [Young]. Her judgment states,

A determination of the best interests of the child encompasses a myriad of considerations, as child custody and access decisions have been described as “ones of human relations in their most intense and complex form.” ... Courts are required to predict the happening of future events rather than to assess the legal import of past acts and judge the effect of various relationships on the best interests of the child, all the while weighing innumerable variables without the benefit of a simple formula.

life itself.”¹¹ Even a judge who is certain about what outcomes are best in general may be no closer to being able to predict which decision is most likely to produce those outcomes. Some scholars have claimed that BIC is essentially indeterminate or unknowable by law.¹²

However, there are two points of consensus regarding what is in children’s best interests after their parents’ relationship ends. First, all else being equal, children typically benefit from the preservation of meaningful relationships with both of their parents.¹³ Second, inter-parental conflict is not in the interests of children, especially if the children are aware of that conflict.¹⁴ Much of the live controversy in the literature is about how to reconcile these two principles. Specifically, scholars debate whether reforms designed to strengthen children’s relationships with both parents post-separation would increase conflict to the extent that they would do more harm than good.¹⁵

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11. Robert H. Mnookin, “Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy” (1975) 39 *Law & Contemp. Probs.* 226 at 260.
 12. John Dewar, “The Normal Chaos of Family Law” (1998) 61 *Mod. L. Rev.* 467 at 479; Jon Elster, “Solomonic Judgments: Against the Best Interest of the Child” (1987) 54 *U. Chicago L. Rev.* 1. See also Robert Leckey, “Families in the Eyes of the Law: Contemporary Challenges and the Grip of the Past” (2009) 15:8 *IRPP Choices* 2:at 20. Leckey describes it as “an open-textured concept[,] ... a vessel into which judges in individual cases must pour content.”
 13. See e.g. Jennifer E. McIntosh, “Legislating for Shared Parenting: Exploring Some Underlying Assumptions” (2009) 47 *Fam. Ct. Rev.* 389 at 391; Seth J. Schwartz & Gordon E. Finley, “Mothering, Fathering, and Divorce: The Influence of Divorce on Reports of and Desires for Maternal and Paternal Involvement” (2009) 47 *Fam. Ct. Rev.* 506 at 506; and Nicholas Bala & Nicole Bailey, “Enforcement of Access & Alienation of Children: Conflict Reduction Strategies & Legal Responses” (2004) 23 *Can. Fam. L.Q.* 1. This idea is reflected in *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3, art. 9(3) [*UNCRC*]. The Article sets forth the following: “States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.” The *UNCRC* has been ratified but not enacted in Canada.
 14. Andrew Schepard, “Parental Conflict Prevention Programs and the Unified Family Court: A Public Health Perspective” (1998) 32 *Fam. L.Q.* 95 at 95, 105; David B. Doolittle & Robin Deutsch, “Children and High-Conflict Divorce: Theory, Research, and Intervention” in Robert M. Galatzer-Levy & Louis Kraus, eds., *The Scientific Basis of Child Custody Decisions* (Toronto: John Wiley & Sons, 1999) 425 at 426, 430; and Joan Kelly & Robert E. Emery, “Children’s Adjustment Following Divorce: Risk and Resilience Perspectives” (2003) 52 *Fam. Rel.* 352 at 353.
 15. See e.g. Martha Shaffer, “Joint Custody, Parental Conflict and Children’s Adjustment to Divorce: What the Social Science Literature Does and Does Not Tell Us” (2007) 26 *Can. Fam. L.Q.* 285 at

Also incontrovertible is the absence of the word “parents” from the phrase “best interests of the child.” The law’s instruction to resolve disputes according to the best interests of the child therefore precludes consideration of parental interests as ends in themselves. It may well be that solicitude for the emotional and/or financial well-being of a child’s parents is an effective means to the end that is BIC.¹⁶ Children’s interests are served by positive relationships with parents, which in turn may require legal attention to the needs of those parents.¹⁷ However, unless they are instrumental to the interests of the child, parents’ claims regarding what they need or are entitled to are irrelevant according to the BIC doctrine.

A. STATUTE

Custody and access law is governed by the federal *Divorce Act* when the applicant is or seeks to be divorced, and by provincial legislation otherwise. These statutes all instruct decision makers in custody and access cases to choose the available outcome that is most consonant with the best interests of the child.¹⁸ The *Divorce Act* states that “the court shall take into consideration only the best interests of the child” in making or varying an order about the custody of or access to a child.¹⁹

314; Richard A. Warshak, “Punching the Parenting Time Clock: The Approximation Rule, Social Science, and the Baseball Bat Kids” (2007) 45 Fam. Ct. Rev. 600; and Michael Saini & Rachel Birnbaum, “Linking Judicial Decision Making in Joint Custody Awards with Evidence-based Practice: It is Possible” (2005) 24 Can. Fam. L.Q. 139. However, a few advocates for a joint custody presumption actually claim that this reform would reduce interparental conflict. See e.g. Edward Kruk, *Child Custody Access and Parental Responsibility: The Search for a Just and Equitable Standard* (2008), online: <http://www.fira.ca/cms/documents/181/April7_Kruk.pdf>; Pearson & Gallaway, *supra* note 5 at vi.

16. Juliet Behrens, “The Form and Substance of Australian Legislation on Parenting Orders: A Case for the Principles of Care and Diversity and Presumptions Based on Them” (2002) 24 J. Soc. Welfare & Fam. L. 401 at 414; Maria Coley, “Children’s Voices in Access and Custody Decisions: The Need to Reconceptualize Rights and Effect Transformative Change” (2007) 12 Appeal 48; and Solangel Maldonado, “Cultivating Forgiveness: Reducing Hostility and Conflict after Divorce” (2008) 43 Wake Forest L. Rev. 441.
17. Elizabeth S. Scott & Robert E. Scott, “Parents As Fiduciaries” (1995) 81 Va. L. Rev. 2401 at 2415; Behrens, *ibid*.
18. See e.g. *Family Law Act*, S.A. 2003, c. F-4.5, ss. 32-45. Alberta’s *Act* has replaced the terms “custody” and “access” with “parenting order,” “contact order,” and “time with the child.” However, this difference in language does not appear to reflect or to have created a difference in the law.
19. *Supra* note 5, ss. 16(8), 17(5).

Two other subsections in the *Divorce Act* elaborate on the BIC principle, without compromising it. Section 16(9) states that the past conduct of a person is to be considered only if it is "relevant to the ability of that person to act as a parent of a child."²⁰ No evidence or consideration relevant to BIC would be excluded by this provision.²¹ Section 16(10) of the *Divorce Act* may appear at first glance to compromise the BIC principle. It provides that

the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.²²

The same language appears in Saskatchewan's *Children's Law Act*.²³ This is Canada's version of the "friendly parent" rule, versions of which appear in custody and access statutory provisions in many Western jurisdictions.²⁴ It has generated some controversy and has been read as favouring the interests of fathers over mothers.²⁵ In the *Divorce Act* (although not in Saskatchewan's *Children's Law Act*), the section bears the marginal note "Maximum Contact."²⁶

However, the friendly parent rule does not, on its face, detract from or compromise the BIC principle. It merely states that the amount of contact that the court orders the child to have with each parent should be the amount that reflects the child's best interests. The legislative text itself takes no position regarding what amount of contact this would be in any given case. The phrase "Maximum Contact" is a "marginal note," and the *Interpretation Act* states that marginal

20. *Ibid.*, s. 16(9).

21. See also Manitoba's *Family Maintenance Act*, C.C.S.M. c. F20, s. 39(3): "[i]n considering an application under this section, a court shall only receive evidence of the conduct of either parent if the court is satisfied that the evidence bears directly on the parent's ability to care properly for the child."

22. *Divorce Act*, *supra* note 5, s. 16(10).

23. *Children's Law Act*, 1997, S.S. 1997, c. C-8.2, s. 6(5).

24. Brenda Cossman & Roxanne Mykitiuk, "Reforming Child Custody and Access Law in Canada: A Discussion Paper" (1998) 15 Can. J. Fam. L. 13 at 51; Linda D. Elrod, "Counsel for the Child in Custody Disputes: The Time is Now" (1992) 26 Fam. L.Q. 53.

25. See e.g. Anne Marie Delorey, "Joint Legal Custody: A Reversion to Patriarchal Power" (1989) 3 C.J.W.L. 33 at 40; Jonathan Cohen & Nikki Gershbn, "For the Sake of the Fathers? Child Custody Reform and the Perils of Maximum Contact" (2001) 19 Can. Fam. L.Q. 121.

26. *Divorce Act*, *supra* note 5, s. 16(10).

notes “form no part of the enactment, but are inserted for convenience of reference only.”²⁷ If one accordingly disregards the phrase, the text of section 16(10) might just as easily be relied upon to favour a custodial parent who has taken steps to ensure that a violent access parent is being kept away from the child. A court might reason that the amount of contact that is consistent with the child’s best interest is none at all, and take into account the custodial spouse’s willingness to facilitate that level of contact. Even if the marginal note is given effect, the friendly parent rule still only means that if two possible outcomes are exactly equal with regard to BIC, the court should choose the one that involves more equal time. It does not, therefore, reflect any form of deviation from the BIC principle.²⁸

The same is true of provincial and territorial family law statutes, which apply to custody and access when the parties are not divorced. Each of these twelve statutes includes the phrase “welfare of the child,”²⁹ “interest of the child,”³⁰ or “best interests of the child”³¹ in its provisions pertaining to custody and access.³²

27. R.S.C. 1985, c. I-21, s. 14.

28. Recent decisions have exhibited some reluctance to order sole custody. See *e.g. Breakey v. Block* (2009), 334 Sask. R. 183 at para. 27 (Q.B. (Fam. Div.)); *Blank v. Micallef*, [2010] W.D.F.L. 552 at para. 63 (Ont. Sup. Ct. J.). An increasing number avoid using the word “custody” at all, preferring to establish a detailed calendar and division of responsibilities. However, courts have reiterated that there is no presumption in Canadian law for the maximization of contact. In *Cavanaugh v. Balkaron* (2008), 446 A.R. 302 (C.A.), the Alberta Court of Appeal overturned a trial judgment (53 R.F.L. (6th) 295 (Q.B.)) that seemed to adopt shared parenting as a starting point. The higher court held at para. 12 that “there are no ... presumptions or default positions that regulate decisions as to custody and access. The sole determinant is the best interests of the child.” An Ontario court found likewise in *Foster v. Foster*, [2009] W.D.F.L. 2824 (Ont. Sup. Ct. J.), additional reasons [2010] W.D.F.L. 12 (Ont. Sup. Ct. J.) at para. 35. See also *Young*, *supra* note 10 at para. 204. The judgment of McLachlin J. reconciles the friendly parent rule with the primacy of BIC in the following way:

[b]y mentioning this factor, Parliament has expressed its opinion that contact with each parent is valuable, and that the judge should ensure that this contact is maximized.... [T]o the extent that contact conflicts with the best interests of the child, it may be restricted. But only to that extent.

29. *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, s. 18(5).

30. Arts. 604, 606 C.C.Q.

31. All the other provincial statutes use this phrase.

32. The *Children’s Law Act*, S.N.W.T. 1997, c. 14 applies to both the Northwest Territories and Nunavut. See also *Custody Jurisdiction and Enforcement Act*, R.S.P.E.I. 1988, c. C-33, s. 2(a). Prince Edward Island is somewhat less explicit in endorsing the BIC principle. Section 2(a) states four purposes of the *Act*, the first of which is “to ensure that applications to the court in respect of custody of, incidents of custody of and access to, children will be determined on

No Canadian statute confers rights on adults in custody and access disputes, or indicates that their interests should be considered.³³

It is true that there is substantial heterogeneity in the factors that provincial and territorial statutes identify as relevant to a child's best interests. However, the variety in enumerated factors does not reflect disagreement about BIC itself. No statute states that the enumerated factors are exhaustive, or provides any priority among them. Indeed, it is not clear whether the factors have any impact whatsoever on outcomes. Professor Jay McLeod observes that differences between the lists of factors in the various applicable Canadian statutes have not resulted in substantive differences in the jurisprudence.³⁴ Jeffery Wilson concludes that the enumerated factors "add nothing" to BIC as an "operative legal concept."³⁵

B. CASE LAW

The Supreme Court of Canada (SCC) has repeatedly emphasized the primacy of the best interests principle in custody and access cases.³⁶ With regard to access, *Young v. Young* established that BIC is the only applicable test when a court considers proposed restrictions on the rights of an access parent.³⁷ As noted in the judgment of Justice McLachlin, "the express wording of s. 16(8) of the *Divorce Act* requires the court to look only at the best interests of the child in making orders of custody and access. This means that parental preferences and 'rights' play no role."³⁸

the basis of the best interests of the children." The *Act* does not specifically state that the decision maker is to resolve disputes on this basis. However, the other three purposes listed in s. 2(a) are interjurisdictional in nature—they seek the correct balance between the jurisdiction of P.E.I. and foreign courts. The P.E.I. statute does not contemplate parental interests or conduct being relevant goals in custody and access decision making.

33. See Yukon's *Children's Act*, R.S.Y. 2002, c. 31, s. 1. The first section of the *Act* explicitly subordinates them to BIC, stating that "if the rights or wishes of a parent or other person and the child conflict the best interests of the child shall prevail."
34. McLeod, *supra* note 2 at § 1(1).
35. Jeffery Wilson & Maryellen Symons, *Wilson on Children and the Law*, looseleaf, vol. 1 (Toronto: Butterworths, 1994) at § 2.2.
36. See e.g. *Gordon v. Goertz*, [1996] 2 S.C.R. 27 at para. 20 [*Gordon*]. The judgment refers to "Parliament's view that the ultimate and only issue when it comes to custody and access is the welfare of the child whose future is at stake." See also *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014 [*Van de Perre*].
37. *Young*, *supra* note 10.
38. *Ibid.* at para. 202.

Gordon v. Goertz concerned the variation of custody in cases in which the custodial parent proposed to move with the child. A SCC majority found that “the amendments to the *Divorce Act* in 1986 ... elevated the best interests of the child from a ‘paramount’ consideration to the ‘only’ relevant issue.”³⁹ A central doctrinal issue in *Gordon* was whether there should be a presumption in favour of the custodial parent’s right to move with the child in such cases. The majority reasons of Justice McLachlin for rejecting any such presumption emphasize the absence of any place for parental rights. The “most important” reason identified by the judgment for avoiding such a presumption is that it “tends to shift the focus from the best interests of the child to the interests of the parents.”⁴⁰ The conclusion emphasizes again that “the focus is on the best interests of the child, not the interests and rights of the parents.”⁴¹

The most recent SCC judgment about custody or access was 2001’s *Van de Perre v. Edwards*. Whereas *Young* dealt with access and *Gordon* with variation of custody, *Van de Perre* was an appeal of a first instance custody determination. In this unanimous judgment, the court held that “the principal determination to be made in cases involving custody is the best interests of the child.”⁴²

Given the statutory authority of BIC, lower courts today have no leeway to depart from the principle.⁴³ However, even before BIC became the universal statutory standard, it was treated as such by courts. The words “best interests of the child” were added to Ontario statutes with the 1978 *Family Law Reform Act*, and they appeared in the federal *Divorce Act* in 1985.⁴⁴ However, by the late 1970s, courts were rarely acknowledging any basis other than BIC for a custody or access order.⁴⁵

39. *Gordon*, *supra* note 36 at para. 19.

40. *Ibid.* at para. 46.

41. *Ibid.* at para. 49.

42. *Van de Perre*, *supra* note 36 at para. 9.

43. Examples can be found of language that suggests an inchoate conception of parental rights or interests. See e.g. *Nash v. Nash*, [2009] W.D.F.L. 3392 at para. 17 (Sask. Q.B. (Fam. Div.)); *Lutz v. Lutz* (2009), 329 Sask. R. 310 at para. 7 (Q.B.). However, these cases do not justify the outcome on any basis other than BIC.

44. *Family Law Reform Act*, 1978, S.O. 1978, c. 2, s. 35; *Divorce Act*, S.C. 1967-8, c. 24.

45. Nicholas Bala, “Developments in Family Law: The 1993-94 Term – The Best Interests of the Child” (1995) 6 Sup. Ct. L. Rev. 453; Ann Ehrcke, “Limiting Judicial Discretion in Custody Proceedings on Divorce” (1987) 6 Can. J. Fam. L. 211 at 213-14.

Before that time, the case law was characterized by gender and fault-based presumptions that judges relied upon in custody and access disputes. The tender-years doctrine, which was prevalent between 1930 and the early 1970s, held that a child below a certain age was better off in the custody of his or her mother, all else being equal.⁴⁶ During roughly the same period, it was also sometimes presumed that the “innocent party” in a divorce should be entitled to custody.⁴⁷ Decisions were therefore made on the basis of findings of fact about adultery, cruelty, and other marital “faults.”

The important point is that these presumptions were not alternatives to the BIC principle, but rather theories about what would be in the best interests of a child in certain factual scenarios. For example, the 1948 judgment of the Court of Appeal for Ontario in *Youngs v. Youngs* has been cited as an example of the innocent party presumption.⁴⁸ In refusing the adulterous father’s application for custody, the court stated that “it would be positively against [the children’s] interest and detrimental to their welfare to permit him to associate or visit with them.”⁴⁹ Similarly, the same court explained the tender years presumption in 1933 as follows: “the mother, other things being equal, is entitled to the custody and care of a child during what is called the period of nurture[,] ... the time during which it needs the care of the mother more than that of the father.”⁵⁰

One must turn to nineteenth-century case law to find judges making custody awards without justifying them on the basis of BIC. Before roughly 1900, there existed a presumption that fathers were entitled to custody of their children. This was based, at least in part, on a conception of the rights of the father.⁵¹ However,

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- 46. Karina Winton, “‘The Spoilt Darling of the Law’: Women and Canadian Child Custody Law in the Postwar Period (1945-1960)” (2002) 19 Can. J. Fam. L. 193; Susan B. Boyd, *Child Custody, Law, and Women’s Work* (Toronto: Oxford University Press Canada, 2002).
 - 47. Edward D. Bayda, “Procedure in Child Custody Adjudication: A Study in the Importance of Adjective Law” (1980) 3 Can. J. Fam. L. 57 at 65.
 - 48. [1949] O.W.N. 96 (C.A.) [*Youngs*], cited in Rachel Birnbaum, Barbara Jo Fidler & Katherine Kavassalis, *Child Custody Assessments: A Resource Guide for Legal and Mental Health Professionals* (Toronto: Thomson Carswell, 2008) at 6.
 - 49. *Youngs*, *ibid.* at para. 4.
 - 50. *Re Orr*, [1933] O.R. 212 at para. 12 (C.A.). According to McLeod, *supra* note 2 at § 5(1), the tender years presumption “was justified on pragmatic grounds and the welfare of the child was often the cited reason for the presumption.”
 - 51. Danaya C. Wright, “*De Manneville v. De Manneville*: Rethinking the Birth of Custody-Law under Patriarchy” (1999) 17 L.H.R. 247; Christopher Allan Jeffreys, “The Role of Mental

since the demise of this paternal presumption, the law has consistently instructed judges to make decisions on the basis of BIC. Only the presumptions about where the child's interests would lie have shifted.

C. SCHOLARSHIP—MAJORITY SUPPORT FOR BIC

The legislative consensus supporting the BIC principle is mostly echoed in the scholarship, despite a few significant dissents that will be reviewed in Part III(A), below. For the majority, what Martha Fineman wrote in 1989 remains true today: "[a]sserting that a ... position conforms to, or is advanced in a manner designed to advance, the best interests of the child has become the rhetorical price of entry into the debate over custody policy."⁵² BIC as a general principle is so firmly enconced in the law that most scholars do not bother advocating or defending it. Instead, custody and access literature hosts debates over whether certain parenting arrangements should be presumed to be in the best interests of the child.

The general argument for a presumption is that it would enhance determinacy and reduce litigation.⁵³ Advocates for a statutory presumption about BIC will make this argument and then claim that a certain parenting arrangement is usually consonant with BIC, or that it is ordered less often than would be consonant with BIC. For example, a number of scholars have endorsed a primary caretaker presumption, which would award sole custody to the parent who spent more time caring for the child during the relationship, unless the best interests of the child require otherwise.⁵⁴ The primary caretaker presumption evolved from the tender

Health Professionals in Child Custody Resolution" (1986) 15 Hofstra L. Rev. 115 at 118.

52. Martha L. Fineman, "The Politics of Custody and Gender: Child Advocacy and the Transformation of Custody Decision Making in the USA" in Carol Smart & Selma Sevenhuijsen, eds., *Child Custody and the Politics of Gender* (New York: Routledge, 1989) 27 at 36.
53. Guggenheim, *supra* note 10 at 171; Katharine T. Bartlett, "Preference, Presumption, Predisposition, and Common Sense: From Traditional Custody Doctrines to the American Law Institute's Family Dissolution Project" (2002) 36 Fam. L.Q. 11 at 16.
54. Elster, *supra* note 12 at 37; David L. Chambers, "Rethinking the Substantive Rules for Custody Disputes in Divorce" (1984) 83 Mich. L. Rev. 477 at 478; Fineman, *supra* note 52; Nora Holtrust, Selma Sevenhuijsen & Annick Verbraken, "Rights for Fathers and the State: Recent Developments in Custody Politics in the Netherlands" in Smart & Sevenhuijsen, *supra* note 52, 51; and Laura B. Dupaix, "Best Interests Revisited: In Search of Guidelines" (1987) Utah L. Rev. 651 at 661-66. For Canadian perspectives on the primary caretaker presumption, see Bruce Ziff, "The Primary Caretaker Rule: Canadian Perspectives on an American Development" (1990) 4 Int'l J.L. & Fam. 186; Susan Boyd, "Potentialities and Perils of the Primary Caregiver Presumption" (1990) 7 Can. Fam. L.Q. 1.

years doctrine. It is gender neutral, but given prevailing childcare patterns within intact families it would produce the same result in most cases.

The "approximation standard," in turn, evolved from the primary caretaker presumption. It holds that

the court should allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents' separation or, if the parents never lived together, before the filing of the action.⁵⁵

It also looks to parenting arrangements prior to the breakdown in order to structure arrangements afterwards, but it does not have the "all or nothing" quality of the primary caretaker presumption.⁵⁶ Another group of scholars argues for a joint custody or shared-parenting presumption.⁵⁷ Today, those in this group are more likely to advocate presumptions about the amount of time the child should spend with the two parents, as opposed to the allocation of rights involved in custody.⁵⁸ Joint custody presumptions have been introduced in several American states, but they have had less success in Canada.

What unites these scholarly arguments for presumptions is their claim to be salutary for the children involved.⁵⁹ For example, a number of joint custody presumption advocates have cited this conclusion from Robert Bauserman's meta-analysis: "[c]hildren in joint custody are better adjusted, across multiple types of measures, than children in sole (primarily maternal) custody."⁶⁰ However, those who support a primary caretaker presumption or approximation standard, and those who advocate a simple BIC standard without presumptions, have identified other research results that seem to reflect children's interests just as clearly.

55. American Law Institute, *supra* note 9 at s. 2.08.

56. Guggenheim, *supra* note 10 at 150.

57. Kruk, *supra* note 15; Shannon Dean Sexton, "A Custody System Free of Gender Preferences and Consistent with the Best Interests of the Child: Suggestions for a More Protective and Equitable Custody System" (1999) 88 Ky. L.J. 761; and Brian J. Melton, "Solomon's Wisdom or Solomon's Wisdom Lost: Child Custody in North Dakota—A Presumption that Joint Custody is in the Best Interests of the Child in Custody Disputes" (1997) 73 N.D.L. Rev. 263.

58. Schwartz & Finley, *supra* note 13 at 519.

59. Bartlett, *supra* note 53 at 16.

60. Robert Bauserman, "Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review" (2002) 16 J. Fam. Psychol. 91 at 97. Bauserman was cited, for example, by Kruk, *supra* note 15.

Martha Shaffer, for example, reviewed a number of studies and concluded that “the research to date indicates that children do not fare better post-divorce in joint custody arrangements than they do in sole custody, and some children—including those in high conflict families—may fare worse.”⁶¹

Helen Reece observes that even those few authors who may appear to be arguing against BIC are actually arguing only against the broad and unelaborated form in which BIC appears in our law. She claims that the true position of this group is not that adults’ rights should be given effect, but rather that “a more determinate principle would serve the child’s interests better, since it would lead to decisions which would be both arrived at more quickly and more acceptable to the parents.”⁶² Reece’s conclusion regarding the literature as a whole is simply that “everybody agrees that children’s welfare should be paramount.”⁶³

D. THE DISTINCTIVENESS OF BIC

The primacy of BIC makes custody and access a unique area of our law, insofar as the litigants in a custody or access dispute have no legitimate rights or interests in the outcome. Professor Reece points out that “there is no other area of the law in which only one participant is valued.”⁶⁴ Reece seems to be correct that the law is distinctive in its focus on a single individual. However, as will be pointed out in Part II, the individual in question is very often not a “participant” in the process at all.

There is thus a sharp distinction between custody and access on the one hand and financial family law disputes on the other. A dispute over spousal support or matrimonial property division is in a fundamental way akin to a contract or tort dispute. It involves litigants asserting their own legal rights against each other. Child support was created by our law, at least in part, for the benefit of children.⁶⁵

61. Shaffer, *supra* note 15 at 287. See also the judgment of L’Heureux-Dubé J. in *Young*, *supra* note 10 at para. 79, paraphrasing the argument made for the primary caretaker presumption in *Boyd*, *supra* note 54. The judgment states, “[O]ne of the principal rationales for endorsing this presumption is not to supplant the best interests of the child as the ultimate objective but to ensure that those interests are protected.”

62. Helen Reece, “The Paramountcy Principle, Consensus or Construct?” (1996) *Curr. Legal Probs.* 267 at 274.

63. *Ibid.* at 271.

64. *Ibid.* at 275.

65. *Federal Child Support Guidelines*, S.O.R./97-175, s. 1 [*Federal Child Support Guidelines*]. Section 1 states, “[T]he objectives of these Guidelines are a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of

However, child support is almost always money that the law requires one parent to pay to another.⁶⁶ The law does not require the recipient parent to spend the money received on the child, nor does it require the payor parent to pay child support to the child if the recipient does not seek it. Despite its name, child support law is a balancing of the rights of the two adult litigants. It is therefore fundamentally akin to spousal support and matrimonial property division, and fundamentally different from custody and access law.

Nor does child protection law share the distinctive nature of custody and access. The purpose of child protection law, like custody and access law, is to uphold the best interests of children.⁶⁷ The state intervenes in families in order to protect children, which is consonant with the BIC principle. However, for constitutional and policy reasons, parents are allowed to assert their own rights of family autonomy and privacy in the process.⁶⁸ Child protection law is a contest between these parental rights and the state's obligation to protect endangered children. Insofar as parental rights are a key feature of child protection law, it is unlike custody and access law.

Indeed, there does not seem to be any part of the law that shares the distinctive feature of custody and access law—the irrelevance of the interests and rights claims of the parties to the dispute. This distinctiveness leads logically to questions about the procedure whereby custody and access claims are adjudicated. Does the procedure, like the law, disregard the interests of the parties in favour of those of the child? Part II, below, takes up this question.

II. PROCEDURE—THE RIGHTS OF THE PARENT

The word “procedure” is not used in this Part to refer to the voluntary efforts that the parties may make to resolve their dispute, such as mediation, collaborative family law, or traditional negotiation.⁶⁹ These do not result in a binding

both spouses after separation.”

66. In rare cases involving adult children, child support may be ordered payable to the child directly.

67. See *e.g.* *Child and Family Services Act*, R.S.O. 1990, c. C.11, s. 1(1). The subsection states, “The paramount purpose of this Act is to promote the best interests, protection and well being of children.”

68. See *e.g.* *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46.

69. Such efforts may or may not be “court-connected,” and participation may or may not be

outcome unless the parties agree. Rather, the focus here is on the procedure by which the state imposes a solution to the dispute if the parties do not agree and initiate litigation.

Part II will ask (i) who decides if the procedure occurs, (ii) whose evidence predominates during the procedure if and when it does occur, and (iii) who decides when the procedure ends. I will suggest that there is a single answer to all three of these questions: the adult parties. Thus, while custody and access law is focused entirely on the best interests of children, in custody and access procedure it is the rights of parents that predominate. While the law is distinctive in its exclusive valorization of a non-party's interests, custody and access litigation procedure is fundamentally akin to other civil litigation—the parties are in control.⁷⁰ Some elements of the procedure endow one parent with control at the expense of the other and others endow them collectively, but very few are designed to place the child's interests first.

This reality is tellingly revealed by Ontario's *Family Law Rules* (FLR), which apply to custody and access as well as other family disputes.⁷¹ Rule 2 of the FLR states that their "primary objective [is] to enable the court to deal with cases justly."⁷² Dealing with a case justly is then defined to include "ensuring that the procedure is fair to all parties."⁷³ Because children are never (or almost never) parties to the custody and access disputes that concern them,⁷⁴ the FLR do not include children's interests as part of their definition of justice. While the drafters

mandatory before litigation can be conducted. Some ADR processes used to resolve family disputes are consciously designed to protect the interests of children involved in custody and access disputes. See e.g. Sharlene A. Wolchik *et al.*, "The New Beginnings Program for Divorcing and Separating Families: Moving from Efficacy to Effectiveness" (2009) 47 Fam. Ct. Rev. 416; American Bar Association, "Model Standards of Practice for Family and Divorce Mediation" (2001) 35 Fam. L.Q. 27.

70. Gerald W. Hardcastle, "Adversarialism and the Family Court: A Family Court Judge's Perspective" (2005) 9 U.C. Davis J. Int'l L. & Pol'y 57 at 65-66.

71. O. Reg. 114/99 [*Family Law Rules*].

72. *Ibid.*, s. 2(2).

73. *Ibid.*, s. 2(3)(a).

74. It is not clear whether statutes even permit a minor child to have party status in a custody or access dispute anywhere in Canada, according to Wilson & Symons, *supra* note 35, vol. 2 at § 6.4. See also Noel Semple, "The Silent Child: A Quantitative Analysis of Children's Evidence in Canadian Custody and Access Cases" (2010) 29 Can. Fam. L.Q. 1 [Semple, "The Silent Child"]. The author reviewed 181 reported custody and access decisions from 2009 and did not find children with party status in any of them.

of Rule 2 probably did not consciously intend to put parents ahead of children, my argument is that this provision's exclusion of children's interests is generally representative of custody and access procedure.⁷⁵

A. PARENTS DECIDE IF THE PROCEDURE OCCURS

After separating, parents have two powerful procedural rights. First, each parent has the right to *initiate* the custody and access decision-making procedure at least once. Second, subject to a narrow set of exceptions, each parent has the right to *avoid* the decision-making procedure.⁷⁶

The adult right to initiate the procedure is based in two statutes. Section 21 of the *Children's Law Reform Act* (CLRA) states that "a parent of a child or any other person may apply to a court for an order respecting custody of or access to the child or determining any aspect of the incidents of custody of the child."⁷⁷ This provides a broad entitlement to bring an application, which the CLRA limits in only two ways. Section 22 allows an Ontario court to decline jurisdiction if another province would be a more appropriate venue for the litigation.⁷⁸ Section 27 automatically stays the application if a *Divorce Act* action is brought and the court hearing the CLRA application does not grant leave to continue it.⁷⁹

The *Divorce Act* requires that a "breakdown of [the] marriage"⁸⁰ be established before a divorce can be granted. Both a final custody order, as well as an access order, are considered corollary relief to a divorce, and can only be obtained after a breakdown of the marriage.⁸¹ However, evidence that the spouses have lived separate and apart for a period of one year is sufficient to establish a breakdown.⁸²

75. See *Family Law Rules*, *supra* note 71, s. 3(5). It is interesting to note that the *Rules* justify procedural variations on the basis of the child's best interests with regard to child protection, but not with regard to custody or access cases.

76. Parent X may avoid the procedure, provided that Parent Y is willing to assume custody. In the rare event that neither X nor Y wants custody, the parents might have to be involved in arranging other parenting for the child, or else risk prosecution for neglect.

77. *Supra* note 3, s. 21.

78. *Ibid.*, s. 22.

79. *Ibid.*, s. 27.

80. *Supra* note 5, s. 8(1).

81. An interim custody or access order can be obtained pending the determination of a divorce action. See *ibid.*, s. 16(2).

82. *Ibid.*, s. 8(1)-(2).

The cumulative effect of the CLRA's lack of any threshold and the *Divorce Act*'s low threshold is that parents can almost invariably initiate the state's custody and access decision-making procedure with regard to their children at least once.

Conversely, in the absence of child protection concerns, the state's custody and access decision-making procedure is undertaken *only if* one or both separated parents trigger it. Separating parents who wish to avoid the procedure are allowed to do so, as long as they pass the relatively low standard of parenting required by the child protection system. This is most obviously true when married or unmarried parents separate without a divorce. There is no legal obligation for them to involve a neutral decision maker in any way.⁸³

A divorce can only be granted by a judge, even if the divorcing parties have reached an agreement about parenting arrangements. Section 11(1)(b) of the *Divorce Act* provides that "in a divorce proceeding, it is the duty of the court ... to satisfy itself that reasonable arrangements have been made for the support of any children of the marriage, having regard to the applicable guidelines." The word "support" could conceivably be read to refer to parenting arrangements. However, the reference to the *Child Support Guidelines* makes it clear that judges need only scrutinize the financial arrangements,⁸⁴ and the reality is that most judges in Ontario today do not override consensual parenting arrangements.⁸⁵ The most obvious reason why the parties might choose to avoid the procedure is that they are in agreement about what is best for their child(ren). However, it is misleading to assume that parents who have avoided the procedure have "settled," in the sense of negotiating an agreement that they both understand and accept. Litigation has very substantial costs for parents in time, money, and stress, and parents may simply abandon the effort to obtain a court order or oppose one sought by another party.

83. See *Children's Law Reform Act*, *supra* note 3. In Ontario, to obtain an order for custody or access under the *Act*, one must convince a judge of its merits. However, the law does not require one to obtain such an order before acting as a parent to a child.

84. The jurisprudence confirms this reading of s. 11(1)(b). The author was able to find only one reported case in which s. 11(1)(b) was used to decline the parties' request for a divorce order incorporating their consensual custody arrangement. See *Hayes v. Hayes* (1987), 6 R.F.L. (3d) 138 (Sask. Q.B.) (a trial level decision issued early in the life of the 1985 *Divorce Act*). Given that judges have no power to secure compliance in the absence of litigation being commenced by one of the parties, they are unlikely to use the power to withhold divorce in order to compel the parties to formally adopt custody arrangements other than those that they prefer.

85. *Supra* note 5.

B. PARENTS CONTROL MOST OF THE EVIDENCE

While the legal focus of custody and access litigation is the best interests of the child(ren) involved, the evidence is entirely controlled by the adult litigants in a very substantial portion of the litigated cases. There are two types of evidence in custody and access litigation. *Children's evidence* includes evidence coming either directly from the child, from a lawyer representing the child, or from another professional with child-related expertise. *Parents' evidence* includes everything else, such as the statements of the parents and the friends and relatives whom they choose to call.⁸⁶

Although civil procedure generally allows only the parties to bring forward evidence, children's evidence is welcomed by the law in custody and access cases. For example, Ontario's CLRA states that "in considering an application under this Part, a court where possible shall take into consideration the views and preferences of the child to the extent that the child is able to express them."⁸⁷ The SCC has called for attention to the views of the child, at least in the context of variation applications.⁸⁸

However, children do not in any part of the country have an enforceable right to be involved in custody and access litigation that concerns them. To determine how often they actually do participate, the author undertook a quantitative survey of all 181 custody and access decisions that were reported in either the Westlaw Canada or the Quicklaw Canada databases during a five-month period in 2009.⁸⁹ The purpose of this study was to determine how many judgments included any reference to children's evidence, as defined above.

86. Note, however, that Ontario's legislation was recently amended to *require* adults to submit certain evidence when applying to court for a custody or access order. See *Children's Law Reform Act*, *supra* note 3, s. 21. The required evidence includes a "plan for the child's care and upbringing" and information about the applicant's past involvement in family, child protection, or criminal proceedings.

87. *Ibid.*, s. 64(1). See also British Columbia's *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 24(1)(b); Art. 30 C.C.Q.

88. *Gordon*, *supra* note 36 at paras. 49(7)(d), 65.

89. See Westlaw Canada, online: <<http://home.westlawecarswell.com>>; Quicklaw Canada, online: <<http://www.lexisnexis.ca/en/quicklaw/>>. Both of these databases use the phrase "custody and access" in the keywords if a case is about a private parenting dispute. The author reviewed all 302 cases with these keywords from the sample period, and excluded those from the sample in which the outcome was not based on a judicial decision about the best interests of the child.

The results of this study are published elsewhere,⁹⁰ and only the central findings need be reproduced here. In 55 per cent of the judgments, no children's evidence was mentioned. In these cases, the case report refers only to evidence that came from the adult litigants themselves and from the witnesses that they chose to call. Among the 45 per cent in which there was some sort of children's evidence mentioned, it was usually a custody assessment.⁹¹ Children were represented by their own lawyers in only 7 per cent of the cases, and children's voices were heard directly in only 3 per cent.⁹² In none of the 181 cases was a child an actual party to the litigation. This research suggests that, in the majority of custody and access cases, the adult litigants control all of the evidence.

In an earlier quantitative analysis of Quebec cases (both settled and adjudicated), Renée Joyal and Anne Queniat found even less children's evidence. Assessments were found in 12 per cent of their cases, testimony by children in 6 per cent, and child legal representation in 3 per cent.⁹³ One author goes so far as to conclude that children "are, for the most part, rendered invisible and voiceless in legal proceedings."⁹⁴ It can at least be said that parents very often control most or all of the evidence that comes before the decision maker in a custody and access case.

C. PARENTS DECIDE WHEN THE PROCEDURE ENDS

If the procedure does begin, parents can also usually decide when it ends. While they may—and hopefully do—consider their children's welfare in making these decisions, their discretion is not substantially constrained by the children's pref-

90. Semple, "The Silent Child," *supra* note 74.

91. The recommendations made in these assessments are not necessarily determinative if the adults' evidence points in a different direction. An earlier empirical study focused on reported custody and access decisions in which recommendations were made by neutral social worker assessors employed by Ontario's Office of the Children's Lawyer. Judges accepted only approximately half of the 151 assessor recommendations about what outcome would be in the best interest of the child. See Noel Semple, *The Eye of the Beholder: Professional Opinions about the Best Interests of a Child* (LL.M. Thesis, Osgoode Hall Law School, 2009) [unpublished], online: <<http://www.noelsemple.ca/?p=47>>.

92. Semple, "The Silent Child," *supra* note 74 at 13.

93. Renée Joyal & Anne Queniat, "Enhancing the Child's Point of View in Custody and Access Cases in Quebec: Preliminary Results of a Study Conducted in Quebec" (2002) 19 Can. J. Fam. L. 173.

94. Coley, *supra* note 16 at 52.

ferences or interests. A custody or access dispute can be settled by the parties mutually at any time, and either party can end the litigation by abandoning his or her claim.⁹⁵ Ontario's FLR provide at Rule 12(1) that "a party who does not want to continue with all or part of a case may withdraw all or part of the application, answer, or reply by serving a notice of withdrawal on every other party and filing it."⁹⁶ However, a parent may bring the process to a halt by simply failing to appear or pursue the litigation. Failure to file a notice of withdrawal will, at worst, produce an order for costs if the other party seeks one.

Conversely, a parent has wide latitude to continue the procedure if he or she chooses to do so, even in the face of a "final" ruling. Most parents resolve their disputes without any, or with very limited, recourse to the courts. However, a small but persistent minority relitigate continually about the custody and access arrangements for their children. The parenting arrangement that is in the best interests of a child depends on facts that can easily change, because children and their needs evolve over time. Their parents' respective abilities to meet those needs can also easily shift. Statute and case law have therefore established a relatively low threshold for a party subject to an existing custody or access order who wishes to continue litigating.⁹⁷ This section will review the three primary procedural impediments to relitigation of custody and access disputes. I will argue that, despite these provisions, the only guaranteed end to custody and access litigation comes when the child in question becomes an adult in the eyes of the law. In the words of Ontario Family Court Judge Harvey Brownstone, "[f]amily court orders involving children are never truly final."⁹⁸

95. See *Family Law Rules*, *supra* note 71, ss. 2(5)(c), 17(4)-(6), 18(14)-(16). Settlement is actively encouraged by the FLR. Rule 2(5)(c) requires the court to engage in "active management of cases, which includes ... helping the parties to settle all or part of the case." Examples of this policy in the FLR include Rules 17(4)-(6), which provide for case conferences, settlement conferences, and trial management conferences respectively. For each of these, the first purpose listed is "exploring the chances of settling the case." See also Rule 18(14)-(16), which make settlement offers relevant to costs orders.

96. *Ibid.*, s. 12(1).

97. Esther L. Lenkinski, Barbara Orser & Alana Schwartz, "Legal Bullying: Abusive Litigation within Family Law Proceedings" (2003) 22 Can. Fam. L.Q. 337; Sandra A. Goundry, *Final Report on Court-Related Harassment and Family Law "Justice": A Review of the Literature and Analysis of the Case Law* (Ottawa: National Association of Women and the Law, 1998) at 38.

98. Harvey Brownstone, *Tug of War: A Judge's Verdict on Separation, Custody Battles, and the Bitter Realities of Family Court* (Toronto: ECW Press, 2009) at 19.

1. THE MATERIAL CHANGE THRESHOLD

Once a custody or access order has been made by a court, a party seeking to vary it must demonstrate a “material change in [the] circumstances” of the child. The CLRA uses these words at section 29(1).⁹⁹ The *Divorce Act* refers at section 17(5) to a “change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the [previous] custody order,” but the SCC confirmed in *Gordon* that the change must have been “material.”¹⁰⁰ The SCC went on to explain the threshold as follows:

[t]he requirement of a material change in the situation of the child means that an application to vary custody cannot serve as an indirect route of appeal from the original custody order. ... Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way. ... [T]he question is whether the previous order might have been different had the circumstances now existing prevailed earlier. ... [M]oreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order.¹⁰¹

The material change threshold was created to prevent unnecessary litigation, and courts do apply it to give effect to this intent. The Court of Appeal for Saskatchewan, for example, recently confirmed that the mere passage of time (and increasing maturity of the child) cannot in and of itself constitute a material change in circumstances.¹⁰² Given the substantial number of variation applications that are rejected on the material change threshold, it is probably an effective deterrent to litigation of this nature.

However, the material change threshold does not by any means deprive parents of their right to decide when the litigation will end. It can only be applied by a judge. Thus, while it deters variation applications, if the application is commenced, litigation and its attendant costs will be required merely in order to determine that there has been no material change.

More importantly, the material change threshold only applies to variation applications, and parents who wish to continue litigating about their children have various other avenues open to them. Like all court orders, custody and access

99. *Children's Law Reform Act*, *supra* note 3, s. 29(1).

100. *Divorce Act*, *supra* note 5, s. 17(5); *Gordon*, *supra* note 36.

101. *Gordon*, *ibid.* at paras. 11-12.

102. *Wiegiers v. Gray*, [2008] 291 D.L.R. (4th) 176 (Sask. C.A.), *rev'g* (2007), 291 Sask. R. 48 (Q.B.).

judgments are subject to appeal.¹⁰³ Contrary to some earlier suggestions of an especially deferential standard of appellate review for custody and access cases due to the child's interests in finality,¹⁰⁴ the SCC held in *Van de Perre* that "the scope of appellate review does not change because of the type of case on appeal."¹⁰⁵ Rollie Thompson found that, among appellate custody decisions involving a parental mobility element issued between 1996-2006, the trial outcome was overturned in 45 per cent.¹⁰⁶ This suggests that appellate deference in parenting decisions may be more of a "talk" than a "walk."

In addition to appealing a previous order, a party wishing to continue litigation may allege that the other is in contempt of it. Given the complexity of many court-ordered parenting schedules, breaches are common and any such breach can be seized upon by a committed litigant looking to bring a contempt motion.¹⁰⁷ Motions may also be brought with regard to the admissibility of evidence, costs, and various other procedural issues.

The saga of *Geremia v. Harb* offers an extreme example of how long parenting litigation can continue in the absence of any finding of a material change. Frank Geremia and Lily Marie-Thérèse Harb were married in 1999, and their daughter was born in the following year. They separated in 2001 and were divorced in 2002. From 2001 until 1 May 2008, they litigated about the parenting arrangements for their daughter. At least twenty-five court orders were produced by this dispute, including five lengthy judgments by Justice J.W. Quinn of the Superior Court of Justice in St. Catherines.¹⁰⁸ At least eight differ-

103. *Family Law Rules*, *supra* note 71, s. 38.

104. See *e.g. deVerteuil v. deVerteuil* (1986), 5 R.F.L. (3d) 294 (B.C. C.A.).

105. *Van de Perre*, *supra* note 36 at para. 14.

106. D.A. Rollie Thompson, "Ten Years After *Gordon*: No Law, Nowhere" (2007) 35 R.F.L. (6th) 307.

107. *Family Law Rules*, *supra* note 71, s. 31.

108. Quinn J.'s five sets of written and reported reasons in the matter of *Geremia v. Harb* were delivered on 25 August 2006 (32 R.F.L. (6th) 218 (Ont. Sup. Ct. J. (Gen. Div. Fam. Ct.))); 14 November 2006 ([2007] W.D.F.L. 2677 (Ont. Sup. Ct. J. (Gen. Div. Fam. Ct.))); 24 January 2007 ([2007] W.D.F.L. 4500 (Ont. Sup. Ct. J. (Gen. Div. Fam. Ct.))) [*Geremia* (2007)]; 2 August 2007 (40 R.F.L. (6th) 362 (Ont. Sup. Ct. J. (Gen. Div. Fam. Ct.))); and 1 May 2008 (90 O.R. (3d) 185 (Sup. Ct. J. (Gen. Div. Fam. Ct.))) [*Geremia* (2008)]. In these reasons, reference was made to eight other unreported judgments on 2 May 2002, 15 September 2002, 31 July 2003, 15 November 2004, May 2007, September 2007, November 2007, and December 2007. In the May 2008 judgment, Quinn J. states that there were

ent judges were involved, and the continuing record eventually occupied thirteen volumes and two thousand pages.¹⁰⁹ The trial that occurred in the summer and fall of 2006 involved fifty-seven days of oral evidence.¹¹⁰ The Office of the Children's Lawyer (OCL) prepared three assessments about this parenting dispute.

Although custody is generally perceived to be a more significant issue than access, custody was not an issue in this extreme example of repetitive litigation. Geremia had consented to Harb having sole custody in 2002, with Geremia exercising access. Motions to vary the terms of access were repeatedly brought by both parties. Another central dispute was about Harb's obligation, pursuant to one of the early court orders, to share medical and educational information about the child with Geremia. Her failure to do so gave rise to three contempt motions, which in turn led to litigation about costs and a motion for leave to appeal.

The most recent—and perhaps final—judgment came on 1 May 2008. Geremia had moved for increased access; Harb moved to dismiss Geremia's case due to his failure to pay child support. Both parties sought costs with regard to the foregoing litigation. Access was increased somewhat, and the cost claims of both parties were dismissed due to their conduct. The most distinctive passage in this judgment of Justice Quinn came in the final three paragraphs:

[f]inally, neither party shall be permitted to commence or continue any proceeding in the Superior Court of Justice, directly or indirectly related to their child, without first having obtained leave of the court. I make this order pursuant to subsection 140(1) of the *Courts of Justice Act*. ... [T]he parties have gorged on court resources as if the legal system were their private banquet table. It must not happen again. ... By requiring leave, I do not think that I am impermissibly fettering access to the courts by either party. If they have a case with merit, I expect that leave will be granted and justice will be done.¹¹¹

2. THE VEXATIOUS PROCEEDINGS THRESHOLD

The mechanism by which Justice Quinn brought *Geremia v. Harb* to an apparent end was section 140(1)(a) of Ontario's *Courts of Justice Act*, "Vexatious Proceedings."¹¹² This provision states that a litigant who has "persistently and without

twenty-five orders in all.

109. *Geremia* (2008), *ibid.*

110. *Geremia* (2007), *supra* note 108 at paras. 13-14, 17.

111. *Geremia* (2008), *supra* note 108 at paras. 94-96.

112. R.S.O. 1990, c. C.43, s. 140(a). There are analogous provisions in other provinces.

reasonable grounds ... instituted vexatious proceedings in any court"¹¹³ may be forbidden to institute further proceedings without the leave of the court. The Court of Appeal for Ontario has held that the purpose of this provision is to "codify the inherent jurisdiction of the Superior Court to control its own process and to prevent abuses of that process by authorizing the judicial restriction, in defined circumstances, of a litigant's right to access the courts."¹¹⁴ That court has also confirmed that section 140(1)(a) can be used to prevent custody or access variation proceedings undertaken without leave, even before applying the "material change" test.¹¹⁵

However, it is very rare for even the most protracted custody and access litigation to be found vexatious.¹¹⁶ *M. (J.M.) v. M. (K.A.A.)*¹¹⁷ was a 2009 Newfoundland decision interpreting that province's version of the vexatious proceedings rule. Like in *Geremia*, access was the primary issue. The court summarized the procedural history of the case:

[t]he duration and extent of this litigation between the parents demonstrates their almost complete inability to resolve, without Court intervention, issues touching on [the child]'s care and upbringing. There have already been 20 Court applications in this matter addressing a myriad of issues. Examples include: child access, custody, asset disclosure, discovery, document production, stay, contempt, judicial bias, alienation, counselling, expert assessments, child support, directions, interrogatories and more. The hearing on custody and access alone occupied 31 days in Court. The costs to date exceed \$600,000.¹¹⁸

113. *Ibid.*

114. *Kalaba v. Bylykbashi* (2006), 265 D.L.R. (4th) 320 at para. 30 (Ont. C.A.).

115. *Ballentine v. Ballentine* (2003), 65 O.R. (3d) 481 at para. 39 (C.A.) [citations omitted]. The judgment states,

It allows the court to make an order prohibiting a person who has persistently and unreasonably instituted vexatious proceedings from instituting further legal proceedings without leave of the court. This is particularly important in family law matters, given the availability of variation orders for support and custody. ... Without some mechanism to prevent abuse, a party could bring an endless stream of variation applications, with a new one launched as soon as the last one has been denied. ... Accordingly, initiating new court proceedings could become a form of harassment of one's former spouse. Section 140 of the CJA is a mechanism to prevent such abuse.

116. See Philip Epstein & Lene Madsen, "Case Comment: *Geremia v. Harb*" (2008) Epstein and Madsen's This Week in Family Law, Iss. 27. Commenting on *Geremia v. Harb*, experienced lawyers Phil Epstein and Lene Madsen said, "We have not seen this kind of order before."

117. *M. (J.M.) v. M. (K.A.A.)* (2009), 282 Nfld. & P.E.I.R. 356 (N.L.S.C. Unif. Fam. Ct.), considering *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D [*M. (J.M.)*].

118. *M. (J.M.)*, *ibid.* at para. 7.

The child was almost seventeen years old at the time of this decision. The father's outstanding applications were for a professional assessment and for access to information about the child. He was also seeking enforcement of a previous access order, although he had acknowledged that the adolescent child should not be forcibly compelled to visit him. The mother moved for the case to be stayed or dismissed. This position was supported by the intervenor, a *guardian ad litem* lawyer representing the child.

The court found that although the litigation was "a very poor example for the Court model of dispute resolution," nonetheless "it is not frivolous or vexatious for a parent to seek access to his child and to seek information about his child's health, education and welfare."¹¹⁹ The judge added that "it would only be in the most exceptional case that a Court would restrict in any way the free access of any person to the Courts to assert his or her civil rights and remedies."¹²⁰ The reference to *rights* in this dictum is a telling indication of the procedural power that courts allow parents. While finding that the child's "best interests would be well served if his parents were to agree to a cooling off period, say six months," this was not ordered.¹²¹ The motion for stay or dismissal was denied.

As the reasoning and result in *M. (J.M.)* suggest, the vexatious proceedings threshold is not designed to curtail custody or access litigation at the point when its continuance is more likely to harm than to help the child. It was drafted and continues to be applied to protect the court—not the child. If and when these provisions are used in this context, a great deal of water has already passed under the bridge. For example, in *Roscoe v. Roscoe*, section 140(1)(a) of the *Courts of Justice Act* was successfully invoked against a litigant who by his own account had appeared in family court on seventy occasions with regard to his divorce.¹²² Cases such as *Geremia, M. (J.M.)*, and *Roscoe* are certainly extreme examples.¹²³

119. *Ibid.* at para. 18.

120. *Ibid.* at para. 19.

121. *Ibid.* at para. 20.

122. (2005), 24 R.F.L. (6th) 331 (Ont. Sup. Ct. J.), leave to appeal to C.A. granted, [2007] W.D.F.L. 4604 (Ont. C.A.) [*Roscoe*]. The Court of Appeal upheld the s. 140 order, but removed the requirement that Roscoe post \$5,000 in security for costs if he were ever to seek leave to continue. See also *Warren v. Pollitt* (1999), 33 C.P.C. (4th) 154 (Ont. Gen. Div.), additional reasons [1999] O.J. No. 740 (Gen. Div.); *A. (A.) v. A. (S.N.)*, [2009] W.D.F.L. 1190 (B.C. S.C.), additional reasons [2009] 9 W.W.R. 337 (B.C. S.C.).

123. Others could certainly be found. A recent newspaper article described—without providing

As noted above, the majority of parents resolve their disputes with little or no judicial intervention. However, these cases demonstrate that the right of a parent to choose when litigation over a minor child ends is little constrained by the law.

3. THE AGE OF CHILD THRESHOLD

While some courts are reluctant to make custody or access orders about older teenagers,¹²⁴ the only guaranteed end to custody and access litigation comes when the child who is the subject of the litigation ceases to be governed by the applicable statute. Under Ontario's CLRA, custody and access orders may be sought with regard to any child who is a minor.¹²⁵ Under the *Divorce Act*, custody and access orders may be made for "any or all children of the marriage."¹²⁶ Minors who have withdrawn from parental charge are not "children of the marriage."¹²⁷ However, a child who has attained the age of majority remains a "child of the marriage," and therefore subject to parenting litigation, if he or she is "unable, by reason of illness, disability or other cause, to withdraw from [the parents'] charge or to obtain the necessities of life."¹²⁸ Until the child ceases to be subject to the CLRA or the *Divorce Act*, no judicial decision about custody or access is necessarily final. Justice Brownstone stated that an outcome that he has seen "far too many times" is one in which "the parents keep litigating for so long that the child in question grows up and becomes an adult."¹²⁹

III. RESOLVING THE INCONSISTENCY

Part I of this article showed that the "best interests of the child" is a golden thread running through the law governing custody and access disputes. Statute and case

the name of—an Ontario access dispute that produced 54 court hearings, and cost \$200,000 in legal fees. See Susan Pigg, "1 divorce, 54 hearings, 5 judges, \$200,000" *Toronto Star* (8 May 2009) L1.

124. *Ladisa v. Ladisa* (2005), 193 O.A.C. 336; *Clayton v. Clayton* (1998), 40 O.R. (3d) 24 (Ct. J. (Gen. Div.)); and *House v. Tunney (House)* (1991), 95 Sask. R. 73 (Q.B.). See also Christine D. Davies, "Access to Justice for Children: The Voice of the Child in Custody and Access Disputes" (2004) 22 Can. Fam. L.Q. 153 at 157.

125. *Children's Law Reform Act*, *supra* note 3, s. 18(2).

126. *Divorce Act*, *supra* note 5, s. 16(1).

127. *Ibid.*, s. 2(1)(a) at "child of the marriage."

128. *Ibid.*, s. 2(1)(b).

129. Brownstone, *supra* note 98 at 14.

law unequivocally instruct judges to choose the available outcome that is best for the child or children involved. The majority of the normative scholarship accepts this premise, and debates what, if any, legal reforms would be in the interests of children. Part I concluded by identifying the feature that makes custody and access law unique, namely that the parties to the dispute have no legally recognized rights or interests in the outcome.¹³⁰

Part II examined the procedure by which the state resolves custody and access disputes when the parties do not settle. Here, the parents are in charge. Parents decide if the decision-making process occurs. If it does occur, they usually control all or most of the evidence that comes before the decision maker. Finally, despite the law's attempt to restrain relitigation through the material change and vexatious proceedings provisions, adults retain a great deal of latitude to continue litigating about custody and access until their children are no longer minors.

This inconsistency is a problem worth resolving. If we intend for adults to have the rights and interests in parenting outcomes that their control of the procedure implies, then we should make these rights and interests explicit in our law. If, on the other hand, we really do mean to put children first, then we must design a procedure that reflects this intention. This Part begins by considering the case for law reform to valorize parents' interests. This is an agenda for which some scholarly support can be found, and is one that the ALI has openly endorsed. It then turns to procedural reform for children. After considering the costs and benefits to children of parenting litigation, the article will sketch three avenues for reform that may help ensure that the benefits exceed the costs.

A. LAW REFORM FOR PARENTS

1. SCHOLARSHIP: MINORITY SUPPORT FOR PARENTS' RIGHTS OR INTERESTS

One way to resolve the inconsistency is to change the law to recognize parents' interests or rights in parenting outcomes. This position is not entirely without precedent in the literature, despite the preponderance of support that the BIC principle has attracted in scholarly debate.¹³¹ The protection of parental interests or rights has sometimes been defended as instrumental in securing children's in-

130. As observed above, children are never or almost never parties to custody and access disputes about them. See Semple, "The Silent Child," *supra* note 74.

131. See Part I(C), above.

terests.¹³² However, the authors reviewed below go further, arguing that parents are worthy of the law's consideration in their own right.¹³³

In the 1980s, David Chambers and Jon Elster both accepted the primacy of children's interests, but argued against the total exclusion of parents from the law's purview.¹³⁴ As Elster put the case, children deserve special protection, but "that protection should not ... extend to small gains in the child's welfare achieved at the expense of large losses in parental welfare."¹³⁵ Elster and Chambers differed about what type of consideration parents should receive. The former argued that the law should focus on parental rights rather than needs, because needs can be misrepresented whereas rights are based on facts.¹³⁶ Chambers, in contrast, would have focused more on parents' emotional *need* for relationships with their children. He argued for a primary caregiver presumption for children under six years of age in part because the secondary caregiver would probably experience less emotional devastation from being deprived of custody than the primary caregiver would in these cases.¹³⁷

An attack on BIC from a different angle came in the 1996 article by English law professor Helen Reece, mentioned in Part I, above.¹³⁸ The statutory and

132. See e.g. Andrew S. Watson, "The Children of Armageddon: Problems of Custody Following Divorce" (1969) 21 Syracuse L. Rev. 55 at 78; Scott & Scott, *supra* note 17 at 2439-40; and Carol Smart & Bren Neale, *Family Fragments?* (Malden, Mass.: Polity Press, 1999) at 198-99.

133. According to one recent paper from researchers at Arizona State University, this position has some support in public opinion. Respondents were read vignettes, and were then asked how parenting time should be allocated. Their responses led the authors to conclude that the respondents are as concerned with making decisions that are fair to the parents as they are with ensuring that custody decisions reflect what is best for the children. See Sanford L. Braver *et al.*, "Lay Judgments about Child Custody After Divorce: Child's Best Interests or Fairness to Parents?" (2009) [unpublished], online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1435043>.

134. Chambers, *supra* note 54; Elster, *supra* note 12. See also Scott Altman, "Should Child Custody Rules be Fair?" (1996) 35 U. Louisville J. Fam. L. 325 at 352-53. In a similar vein, Altman concludes that "child custody rules can consider fairness to adults and still give child welfare due consideration. ... [S]ometimes children either have little to lose, or we have insufficient information as a practical matter to know which of two decisions will best serve the child's interests."

135. Elster, *ibid.* at 20.

136. *Ibid.* at 19. Elster states, "It seems best ... to use rights as a proxy for needs, even if on first-best principles one would want to discount rights not backed by needs."

137. Chambers, *supra* note 54.

138. Reece, *supra* note 62.

scholarly paramountcy of the BIC principle in English law is perhaps even more pronounced than in Canadian or American law. Reece argued that children's interests should not have this privileged status. The central defect that Reece finds in BIC is that its indeterminacy allows it to function as a smokescreen, an empty bit of rhetoric facilitating courts' imposition of orthodox sexual morality.¹³⁹ Reece convincingly makes this case with regard to custody and access cases involving one homosexual and one heterosexual parent. However, she does not develop this critique with regard to the overwhelming majority of parenting disputes, which are not of this nature.¹⁴⁰

A final example of dissent from the BIC consensus comes from an article published by Nicholas Bala and Nicole Bailey in 2004. They observe that "for the high-conflict cases where the parties are most likely to seek the involvement of the justice system, there is social science evidence that [access] can have a negative influence on children's emotional well-being."¹⁴¹ This is because access in these cases causes parental conflict that is harmful to the child, and this harm outweighs any benefit to the child brought about by the contact itself. However, despite this fact, Bala and Bailey proceed to list a number of "powerful arguments for recognizing and enforcing access rights in most high-conflict cases," even when that access would not be in the interests of the child involved.¹⁴²

Some of these are arguments that the best interests of children generally require enforcement of access in a particular case, even if it is contrary to the interests of the specific child involved. For example, they suggest that access enforcement litigation has a general deterrent effect, reducing the likelihood that other custodial parents will deny access and also deterring litigation about parenting generally.¹⁴³ However,

139. *Ibid.*

140. See Semple, "The Silent Child," *supra* note 74. In the author's survey of all 181 Canadian custody and access judgments reported during five months of 2009, no cases were found in which a parent was identified as other than heterosexual. Nor did any of the cases apparently involve two parents of the same gender.

141. Bala & Bailey, *supra* note 13 at 20.

142. *Ibid.*

143. *Ibid.* See also Elster, *supra* note 12 at 17. Elster paraphrases without endorsing the following argument that adultery should be punished by denying custody to the wrongdoer: "[a]lthough the welfare of a given child may be best promoted if custody is given to an adulterous parent, the welfare of children in general may require a presumption, which could be more or less strong, against this practice."

the following passage suggests that Bala and Bailey also believe that access should be enforced because failure to do so would be unfair to the non-custodial parent:

Canadian law imposes and enforces child support obligations on all parents. It would be grossly unfair and deeply undermining of respect for the justice system if non-custodial parents were legally obliged to pay child support, but could not look to the legal system to enforce access.¹⁴⁴

Like much of the scholarship, the dominant thrust of Bala and Bailey's article is upholding the best interests of children, but a subtle undercurrent of concern for adults' rights and interests can also be detected.¹⁴⁵

2. THE ALI'S *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION*

A forthright proposal to recognize parental interests in custody and access law is found in the *Principles of the Law of Family Dissolution* released by the ALI in 2002.¹⁴⁶ The *Principles* are apparently unique in that they explicitly give a place to parents' rights in custody and access law. Chapter two deals with custody and access, *inter alia*, and section 2.02(1) enshrines the BIC principle—"the primary objective of Chapter 2 is to serve the child's best interests."¹⁴⁷

However, section 2.02(2) then states that "a secondary objective of Chapter 2 is to achieve fairness between the parents."¹⁴⁸ The commentary argues that fairness to parents is "a valid objective in itself" that is also "intertwined with the child's interests."¹⁴⁹ This sentence makes it clear that consideration of parental interests is not, for the *Principles*, merely instrumental to serving children. It is an independent, although subordinate, goal. The commentary states that parental fairness can be used as a tiebreaker when two alternatives are equal with regard to

144. Bala & Bailey, *ibid.* at 20-21.

145. Similarly, see Gene C. Colman, "Procedural Fairness and Case Conferences" (2004) 20 Can. J. Fam. L. 379 at 384. Colman asks, "Can any judge therefore truly justify to himself or herself taking custody or access away from a parent absent adequate notice and admissible evidence?" While the idea that custody or access is an entitlement or right belonging to a parent (as opposed to the child) is never explicitly argued, it appears to be the unspoken premise underlying comments like this one.

146. American Law Institute, *supra* note 9.

147. *Ibid.* at s. 2.01(1).

148. *Ibid.* at s. 2.02(2).

149. *Ibid.* at s. 2.02, Comment (b).

BIC.¹⁵⁰ However, it is also clear that parents' interests could be a reason to choose the outcome that would be worse for the child(ren).¹⁵¹ The centrepiece of the *Principles* is the approximation standard described above.¹⁵² One of the arguments given for this standard reflects the parental fairness objective: "[t]he reliance on past caretaking is also designed to correspond reasonably well to the parties' actual expectations."¹⁵³ While the approximation standard has not been widely adopted, it does provide an example of how parental interests in custody and access outcomes might be given legal weight.¹⁵⁴

B. PROCEDURAL REFORM FOR CHILDREN

If the unanimity of our legislators and judges reflects a social consensus that the best interests of the children involved should be the only relevant factor in custody and access disputes, then procedural reform is urgently needed. The status quo empowers adult litigants in ways that often work to the detriment of their children. This section will support this claim before surveying the social science literature regarding the benefits and costs of parenting litigation for the children involved. It will conclude by suggesting reforms that might improve the cost-benefit balance.¹⁵⁵

150. *Ibid.* The ALI states, "[W]hen more than one rule could be expected to serve the interests of children equally well, or when the impact of the alternative rules upon children is uncertain, Chapter 2 adopts the rule most likely to produce results that achieve the greatest fairness between parents."

151. Fairness to parents is less important than BIC under the *Principles of Law*. Presumably, therefore, an outcome not in the child(ren)'s best interest would have to produce a relatively large fairness benefit for parents at the expense of a relatively small detriment to the child(ren), compared to its BIC-maximizing alternative. In this, the *Principles of Law* appear to be accepting Jon Elster's argument about the weights that should be placed on children's and parents' interests. See Elster, *supra* note 12 at 20.

152. American Law Institute, *supra* note 9 at s. 2.08.

153. *Ibid.* at s. 2.08, Comment (b).

154. Michael R. Clisham and Robin Fretwell Wilson, "American Law Institute's Principles of the Law of Family Dissolution, Eight Years After Adoption: Guiding Principles or Obligatory Footnote?" (2008) 42 Fam. L.Q. 573 at 576 (noting that West Virginia is the only state to have adopted the approximation standard).

155. Cost-benefit analysis has some support in Ontario's *Family Law Rules*, *supra* note 71, s. 2(5)(e). This subsection requires judges, in discharging their duty to actively manage cases, to consider "whether the likely benefits of taking a step justify the cost." A passage from a recent judgment of S.B. Sherr J. suggests that Rule 2 might be used with the welfare of the

Custody and access litigation can be analogized to diagnostic surgery on a child patient. Suppose that you are responsible for making medical decisions on behalf of a child who suffers from a medical condition. There are two possible ways to treat this condition, and it is clear that one or the other must be utilized. The child's doctors ask your permission to undertake diagnostic surgery, which will provide information about which of the two treatment options would be better for the child. What do you say?

You should not answer before asking two further questions. First, how substantial are the benefits of the diagnostic surgery for the child? You have been told already that it will help indicate which of the two treatment options is best for the child. However, you don't know whether the diagnostic procedure is certain to answer this question. Is it possible that the results will be ambiguous? Nor do you yet know how important it is for the child's health to pick the better of the two treatment options. Perhaps, regardless of the diagnostic result, the less appropriate treatment would be almost as good as the more appropriate treatment.

Second, what are the costs of the diagnostic surgery for the child? Is there a high probability that it will create moderate short-term pain? Is there a small probability that the procedure itself will also do long-term damage? These questions about benefits and costs for children must also be asked about custody and access litigation if we are to make procedural choices that actually put them first.

1. BENEFITS FOR CHILDREN OF PARENTING LITIGATION

The primary benefit of custody and access litigation for children is that it may lead to the parenting arrangement that is in the child's best interest being put into effect, when this would not otherwise occur. There are three important reasons not to overestimate this benefit. First, the ability of litigation or any other pro-

family in mind: "Rule 2 provides courts with considerable flexibility in managing cases. The days of having the right to endlessly litigate a case without regard to time and expense are over. There is a recognition in the rules that such litigation is damaging to families, creates undue expense, wastes time and does not achieve justice." See *Figurado v. Figurado*, [2009] W.D.F.L. 2352 at para. 9 (Ont. Ct. J.); *Family Law Rules*, s. 2. However, Rule 2(5)(e) does not state whether benefits to the child are relevant. Given that case management is meant to promote the "primary objective" of the FLR and given that the primary objective does not include the interests of the child, the more harmonious reading of this section would be that it is benefits to the parties and benefits to the court that are relevant. See *Family Law Rules*, s. 2(3); Part II, above. In any case, the *Rules* do not in any other place specify benefits to the child as a criterion in making procedural decisions.

cedure to determine with certainty what would be best for a child is highly questionable. As noted above,¹⁵⁶ some scholars argue that it is simply beyond the power of the law—even with mental health science as an ally—to predict what will be best for a child given the uncertainty of the future.¹⁵⁷ In the words of one recent article, “[P]articularly in those cases where angry, hurt, but ‘good enough’ parents are contesting custody or the allocation of time sharing, there is generally no basis in psychology or law for choosing between parents.”¹⁵⁸

Second, even if the procedure does identify the best parenting arrangement, the best arrangement might not be dramatically better for the child than the alternative. A judge seeking to craft the perfect parenting arrangement has limited resources at his or her disposal, namely the time and effort that the litigants are willing to dedicate to the child. If a parent’s conduct is bad enough to pose a clear risk to the child, it is the task of the child protection system, and not that of the judge hearing the private family law matter, to keep him or her away from the child. In most custody and access disputes, both parents are “good enough” to avoid this form of intervention. Within these constraints, the alternatives may represent only small gradations of benefit to the child.

Third, if the best parenting arrangement is identified and put into place, it may not last long. As observed above, variation and appeal provide legal avenues whereby orders may be changed. More commonly, if a party does not comply with a parenting order, and no other party seeks to enforce it, that order becomes a dead letter. Parents with access rights are allowed simply to disappear from a child’s life, with or without the consent of the other parties and the child. A number of authors have noted the mutability of parenting arrangements after litigation.¹⁵⁹ Empirical evidence suggests that shared parenting and joint custody arrangements are espe-

156. See Part I, above.

157. Michael King, “Future Uncertainty as a Challenge to Law’s Programmes: The Dilemma of Parental Disputes” (2000) 63 Mod. L. Rev. 523.

158. Joan B. Kelly & Janet R. Johnston, “Commentary on Tippins and Wittmann’s ‘Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance’” (2005) 43 Fam. Ct. Rev. 233.

159. See e.g. Alison Clarke-Stewart & Cornelia Brentano, *Divorce: Causes and Consequences* (New Haven: Yale University Press, 2006) at 206ff.; Smart & Neale, *supra* note 132 at 36, 42; and Amanda Barratt & Sandra Burman, “Deciding the Best Interests of the Child: An International Perspective on Custody Decision Making” (2001) 118 S.A.L.J. 556 at 559.

cially likely to shift over time.¹⁶⁰ The mutability of post-litigation parenting arrangements often reflects a responsible and pragmatic response on the part of the parents to the changing needs of their child. However, mutability also reduces the expected benefit to a child from a court's parenting order, and therefore increases the chance that the cost of the procedure will exceed the benefit for that child.

2. COSTS TO CHILDREN OF PARENTING LITIGATION

While the benefits of the process for the child are less significant than one might assume, the costs can be substantial.¹⁶¹ Occasionally, children participate directly in custody and access litigation by testifying or being interviewed by a judge. They may also contribute evidence in the form of an affidavit or other written communication to the decision maker. Direct children's participation of this nature occurs rarely in Canada—the author's empirical research described above found it in only 3 per cent of the sample of reported cases.¹⁶² While there is a live debate about the potential benefits to children of direct participation in the process, it is also clear that this can be highly traumatic.¹⁶³ This is especially true if a child is asked directly to choose between his or her parents.¹⁶⁴ It is much more common for children to participate via assessments conducted by psychologists or social workers.¹⁶⁵

160. McIntosh, *supra* note 13; Sharon Moyer, *Child Custody Arrangements: Their Characteristics and Outcomes*, Report 2004-FCY-3E, online: Department of Justice (Canada) <http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2004/2004_3/pdf/2004_3e.pdf>; and Saini & Birnbaum, *supra* note 15. But see Lawrence M. Berger *et al.*, "The Stability of Child Physical Placements Following Divorce: Descriptive Evidence From Wisconsin" (2008) 70 J. Marriage & Fam. 273.

161. Wilson & Symons, *supra* note 35 at § 2.8, citing Norris Weismann, "On Access after Parental Separation" (1992) 36 R.F.L. (3d) 35. Wilson and Symons note, "[S]o dissonant is the courtroom forum from the milieu of the family that the process, in and of itself, results in greater harm than help to those who suffer through it."

162. Semple, "The Silent Child," *supra* note 74 at 13.

163. Ronda Bessner, *The Voice of the Child in Divorce, Custody and Access Proceedings*, 2002-FCY-1E (Background paper) (Ottawa: Department of Justice Canada, 2002), online: <<http://dsp-psd.communication.gc.ca/Collection/J3-1-2002-1E.pdf>> at 56; Nicholas Bala, "Child Representation in Alberta: Role and Responsibilities of Counsel for the Child in Family Proceedings" (2005) 43 Alta. L. Rev. 845 [Bala, "Child Representation in Alberta"]; and Pearson & Gallaway, *supra* note 5 at c. 2, s. B.

164. Bala, *ibid.*

165. Semple, "The Silent Child," *supra* note 74.

While these assessments are designed to gather information about the child without causing harm, some scholars have suggested that assessments can also be emotionally difficult for a child.¹⁶⁶

Children's well-being is affected by their parents' financial security, and custody and access litigation can easily become expensive enough to threaten this security.¹⁶⁷ The median after-tax income for an unattached individual Canadian was \$24,200 in 2007,¹⁶⁸ and a recent report found that the median income of applicants in Ontario's unified family courts was \$25,200.¹⁶⁹ Examining some of the costs associated with parenting litigation against this comparator suggests how substantial the financial impact can be. According to a 2009 survey by *Canadian Lawyer* magazine, the average legal fee for a contested divorce in Ontario is \$12,602.¹⁷⁰ However, a "contested" divorce might not include much, if any, courtroom advocacy, and the average legal cost for a case culminating in a two-day civil trial was \$45,477.¹⁷¹ Retaining other private sector professionals, such as mediators or assessors, naturally adds to the cost. A 2007 article suggested typical costs of \$1,500 to \$6,000 for a social worker assessment, and \$3,000 to \$20,000 or more for a psychologist assessment.¹⁷²

A recent Ontario Bar Association report stated that 40 per cent of civil litigants lack lawyers, and that the rate among family litigants is even higher than this average.¹⁷³ This is in part a symptom of the strain that legal fees put on separating parents.¹⁷⁴ Parents without lawyers save money but pay the price in their own

166. Nicholas Bala, "Mohan, Assessments & Expert Evidence: Understanding the Family Law Context," Working Paper No. 07-02, in *Queen's Faculty of Law Legal Studies Research Paper Series* (14 April 2007), online: <<http://ssrn.com/abstract=989761>> at 36 [Bala, "Mohan"].

167. Schepard, *supra* note 14 at 105.

168. Statistics Canada, "The Daily: Income of Canadians," online: <<http://www.statcan.gc.ca/daily-quotidien/090603/dq090603a-eng.htm>>.

169. Alfred A. Mamo, Peter G. Jaffe & Debbie G. Chiodo, *Recapturing and Renewing the Vision of the Family Court* (Toronto: Ministry of the Attorney General (Ontario), 2007) at 81, online: <<http://www.crvawc.ca/documents/Family%20Court%20Study%202007.pdf>>.

170. Kelly Harris, "The Going Rate" *Canadian Lawyer* 33:6 (June 2009) 32 at 37.

171. *Ibid.*

172. Bala, "Mohan," *supra* note 166 at 25.

173. Ontario Bar Association, *Getting It Right: The Report of the Ontario Bar Association Justice Stakeholder Summit* (Toronto, 2008) at 8, online: <http://www.oba.org/en/pdf/Justice_Summit_sml.pdf>.

174. According to one survey conducted in the Kingston area, 83 per cent of litigants without

time and aggravation. Whether or not the parties have lawyers, litigation is time-consuming to the extent that it can interrupt parenting time.¹⁷⁵ The financial and time stresses of litigation come at a time when the average separating parent is likely to be experiencing various other transitional costs and stresses associated with relationship breakdown.

The financial and time costs of parenting litigation, although paid directly by parents, are also paid indirectly by their children in two ways. First, time and money spent on custody and access litigation is time and money that cannot be spent on parenting. Second, given the stress that is likely to accompany any relationship breakdown, the costs of custody and access litigation create additional strain and financial insecurity that may undermine parenting. Alison Clarke-Stewart and Cornelia Brentano reviewed a number of studies and concluded that the scarcity of resources that often accompanies divorce may account for as much as half of the negative impacts on children that have been associated with it.¹⁷⁶

Finally, custody and access litigation costs children because it increases the likelihood that they will be exposed to parental conflict, which the literature unequivocally establishes to be bad for them. While some parents may expect catharsis from litigation, the reality is that it intensifies hostility. According to Justice Brownstone,

*Most couples who bring their disputes to family court do not enjoy, or ultimately benefit from, the experience. ... [I]n many cases, the parties' ability to communicate and co-operate with each other as co-parents became worse, not better, as a result of family court litigation.*¹⁷⁷

lawyers stated that they were unable to afford the fees. See Anne-Marie Langan, "Threatening the Balance of the Scales of Justice: Unrepresented Litigants in the Family Courts of Ontario" (2004) 30 Queen's L.J. 825 at 832. The rate of self-representation also reflects the small supply of publicly-funded legal aid certificates for private family law disputes. See e.g. Michael Trebilcock, *Report of the Legal Aid Review* (Toronto: Ministry of the Attorney General (Ontario), 2008) at 109, online: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/trebilcock/legal_aid_report_2008_EN.pdf>.

175. Schepard, *supra* note 14 at 105.

176. Clarke-Stewart & Brentano, *supra* note 159 at 135.

177. Brownstone, *supra* note 98 at 12 [emphasis in original].

This point has often been made in the literature.¹⁷⁸ Strong empirical evidence for it came from Marsha Pruett and Tamara Jackson, who conducted interviews with forty-one Connecticut parents who had recently divorced.¹⁷⁹ A remarkable 71 per cent of the respondents stated that the legal process had made their feelings of anger and hostility more extreme.¹⁸⁰ Furthermore, 75 per cent of them “indicated that the process intensified their negative perceptions of the other parent by pitting them against each other and replacing direct communication.”¹⁸¹ In a subsequent article, Pruett and her colleagues argued that

parents’ opposing positions are exacerbated through the adversarial process because the lack of clear facts or standards on which to make judgments serves to augment the family struggles. Conflict spreads and feeds on itself, escalating the destructive family dynamics that the divorce was intended to dissipate. The legal system thus operates as a powerful vehicle for sustaining or increasing parental conflict.¹⁸²

Andrew Schepard concurs that litigation increases interparental hostility, but offers a somewhat different explanation for the phenomenon. He suggests,

[Litigation] puts a premium on parents finding fault with each other. ... [P]arents who participate in adversary procedures focus on the weaknesses of the other parent, rather than focusing on how to reconstruct their post-divorce or separation relationship for their children’s benefit.¹⁸³

178. See e.g. Robert E. Emery, David Sbarra & Tara Grover, “Divorce Mediation: Research and Reflections” (2005) 43 Fam. Ct. Rev. 22 at 35; Rhonda Freeman, “Parenting after Divorce: Using Research to Inform Decision Making about Children” (1998) 15 Can. J. Fam. L. 79 at 104; Hardcastle, *supra* note 70 at 66; and Janet Weinstein, “And Never the Twain Shall Meet Again: The Best Interests of Children and the Adversary System” (1997) 52 U. Miami L. Rev. 79.

179. Marsha Kline Pruett & Tamara D. Jackson, “Lawyer’s Role during the Divorce Process: Perceptions of Parents, Their Young Children, and Their Attorneys” (1999) 33 Fam. L.Q. 283.

180. *Ibid.* at 298.

181. *Ibid.*

182. Marsha Kline Pruett, Glendessa M. Insabella & Katherine Gustafson, “The Collaborative Divorce Project: A Court-Based Intervention for Separating Parents with Young Children” (2005) 43 Fam. Ct. Rev. 38 at 39. See also Brownstone, *supra* note 98 at 12. Brownstone offers a similar explanation for “why litigation [is] such a damaging and destructive way to resolve parental disputes[:] ... [T]he court system is based on an adversarial process in which ‘winning’ is the object of the exercise.”

183. Schepard, *supra* note 14 at 105.

Whatever the reason, there appears to be general agreement that family litigation increases interparental conflict. As noted above, there is an equally strong consensus that interparental conflict is bad for children.¹⁸⁴ One of the costs of custody and access litigation to children, therefore, is its tendency to increase interparental conflict.¹⁸⁵

3. WHY LITIGATING PARENTS MAY BE UNRELIABLE BALANCERS OF COST AND BENEFIT

Sometimes a parent's litigation decisions reflect that parent's accurate perception of the costs and benefits thereof for the child. Parents can be presumed to be aware of their children's interests and they often make altruistic decisions, which put those needs ahead of their own. Like the responsible and conscientious decision maker in the operating room analogy, parents may weigh the costs and benefits before deciding whether and how to initiate or continue the diagnostic surgery that is custody and access litigation.

However, in the context of an acrimonious relationship breakdown, scholars have identified many reasons why a parent's choices about custody and access litigation may not be based on an accurate perception of BIC. First, the costs and benefits of litigation are mysterious, especially to someone who has never been involved in it before. While explaining these costs and benefits is part of a lawyer's job, as noted above at least 40 per cent of family court litigants have no lawyers.¹⁸⁶

Second, there are numerous factors that may cloud the judgment of parents making decisions about custody and access litigation. Parenting litigation may be initiated or prolonged in order to control or punish the other parent, or to prolong cohabitation.¹⁸⁷ Given the context, there are often powerful emotional issues at play. In the words of Robert Emery,

184. *Supra* note 15.

185. Shepard, *supra* note 14 at 95, 105; Watson, *supra* note 132 at 58; and Robert E. Emery, "Interparental Conflict and Social Policy" in John H. Grych & Frank D. Fincham, eds., *Interparental Conflict and Child Development: Theory, Research, and Applications* (New York: Cambridge University Press, 2001) 417 at 421.

186. Ontario Bar Association, *supra* note 173.

187. Elizabeth Scott & Andre Derdeyn, "Rethinking Joint Custody" (1984) 45 Ohio St. L.J. 455 at 493; Maldonado, *supra* note 16; Emery, Sbarra & Grover, *supra* note 178 at 34; and Goundry, *supra* note 97 at 19.

Co-parents are not just parents, but they may be each other's friend (or enemy) lover (or estranged mate), protector (or abuser), economic partner (or competitor), family member (or cast-off). ... [I]nterparental conflict may be a result of, or an expression of, an ongoing dispute about altogether different aspects of the co-parents' relationship. It has been suggested, for example, that many child custody disputes may really be attempts to block divorce or to maintain contact with a former spouse.¹⁸⁸

Carol Smart and Vanessa May suggest that parents interpret the BIC standard as a judgment regarding who is the better parent. Yielding custody therefore means accepting a characterization of oneself as the less adequate parent, which is very difficult for many people to do.¹⁸⁹

Third, a number of scholars have suggested that custody and access litigation can be seized upon by parents who need but lack any other opportunity to be publicly vindicated or to vent.¹⁹⁰ In Canada, as in many other Western jurisdictions, opportunities to discuss fault and conduct in the context of relationship breakdown have been gradually eliminated from our law.¹⁹¹ Although courts and legislatures have also tried to eliminate them from custody and access law, evidence about past conduct is legally relevant if it bears on parenting ability.¹⁹²

188. Emery, *supra* note 185 at 417 [emphasis in original].

189. U.K., Department of Constitutional Affairs, *Residence and Contact Disputes in Court, Volume 2* (DCA Research Series 4/05) by Carol Smart *et al.* (London: Department of Constitutional Affairs, 2005) at 56.

190. Carol Smart & Vanessa May, "Why Can't They Agree? The Underlying Complexity of Contact and Residence Disputes" (2004) 26 J. Soc. Welfare & Fam. L. 347; Francis J. Catania, Jr., "Accounting to Ourselves for Ourselves: An Analysis of Adjudication in the Resolution of Child Custody Disputes" (1992) 71 Neb. L. Rev. 1228 at 1256; Maldonado, *supra* note 16; and U.K., Department of Constitutional Affairs, *Residence and Contact Disputes in Court, Volume 1* (DCA Research Series 6/03) by Carol Smart *et al.* (London: Department of Constitutional Affairs, 2003) at 100.

191. See *Divorce Act*, *supra* note 5, ss. 8(2)(a), 8(2)(b). The overwhelming majority of Canadian divorces are granted on the basis that the spouses "have lived separate and apart for at least one year" under subsection (a), and not on the basis of adultery or cruelty under subsection (b). Conduct is also almost always irrelevant to the financial corollary remedies under the *Divorce Act* and provincial legislation.

192. See *Divorce Act*, *ibid.*, s. 16(9). The subsection states, "In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child." See also *Children's Law Reform Act*, *supra* note 3, s. 24: "[a] person's past conduct shall be considered only, (a) in accordance with subsection (4) [regarding domestic violence]; or (b) if the court

Finally, financial disputes arising from relationship breakdown are likely to be alive at the same time as parenting disputes. Parents may make unreasonable parenting claims in order to gain a bargaining chip that can subsequently be cashed in for financial advantage.¹⁹³ Because child support entitlements can depend on parenting arrangements, parents may have financial incentives to push for custody or for more parenting time in a joint custody arrangement.¹⁹⁴

Justice Brownstone offers compelling examples of parenting litigation for which the costs to the children involved must exceed the benefits, because the benefits are nonexistent:

I regularly see parents starting court motions at the slightest infraction or provocation by the other parent[:] ... a child was not delivered for an access visit with enough clothing; an item of clothing was not returned after an access visit (or was returned unwashed); a child's toy has gone missing; a parent was a few minutes late for an access exchange; a child missed a nap during an access visit. ... I have even seen parents litigate over the length and style of their child's hair, or the brand of toothpaste a child should use.¹⁹⁵

4. IMPROVING THE COST-BENEFIT BALANCE FOR CHILDREN

Part II, above, described three ways in which the procedure serves the adults involved. They decide if the procedure occurs, they control most of the evidence, and they decide when the procedure ends. Not all of these characteristics of the status quo are contrary to children's interests, and good procedural reform for children would likely not involve abandoning them all.

This is true for two reasons. First, some of the procedural power that parents hold is consonant with the interests of their children. For example, for the state to examine all consensual arrangements between separated parents would be very invasive and would probably create more costs than benefits for children. The

is satisfied that the conduct is otherwise relevant to the person's ability to act as a parent."

193. Goundry, *supra* note 97 at 11; Patricia Geraldine Tobin, *Clinical Recommendations for Sole Custody in Child Custody Disputes: An Analysis of Sex-Related Factors in the Decision Making and Assessment Process* (Ph.D. Thesis, Ontario Institute for Studies in Education, University of Toronto, 1989) at 14, 33.

194. *Federal Child Support Guidelines*, *supra* note 65; *Contino v. Leonelli-Contino*, [2005] 3 S.C.R. 217.

195. Brownstone, *supra* note 98 at 14. Later, at page 73, Brownstone adds that "all too often, parents are filled with hatred and vindictiveness that they keep the litigation going as a means of torturing each other without the slightest concern for the effect of their immature behaviour on their children."

procedural empowerment of parents may also lead them to regard the outcomes as more legitimate,¹⁹⁶ which in turn increases the likelihood of compliance, which is in the interests of children.

Second, while custody and access disputes are fundamentally unlike financial family law issues, they do come bundled with those financial issues. People experience them together when intimate relationships break down. A procedure calibrated to protect the child's interests above all would be patently inappropriate for the determination of issues like spousal support and property division, in which children's interests are only tangentially relevant. It would therefore have to be a parallel system, and subjecting families to multiple procedures would have many drawbacks.

However, there are certain practical procedural reforms that could help reconcile custody and access procedure with the best interests of the child. Procedural reform for children would begin by explicitly recognizing their interests in the FLR. An excellent model in this regard is Australia's *Family Law Act*. In any proceeding involving a child in that country, "the first principle is that the court is to consider the needs of the child concerned and the impact that the conduct of the proceedings may have on the child in determining the conduct of the proceedings."¹⁹⁷ The primary objective of Ontario's FLR is "dealing with cases justly," and the definition of "dealing with cases justly," as provided by Rule 2(3), should be amended to include "producing net benefits for any child or children involved in the proceeding."¹⁹⁸ To give effect to this aspiration, it might be wise for the legislature to re-examine the rules about (1) *whether* custody and access litigation occurs, (2) *how* it occurs when it does occur, and (3) *whether and how* children's evidence is heard within it.

196. Colman, *supra* note 145 at 383, 398; Hardcastle, *supra* note 70 at 71-74.

197. *Family Law Act 1975* (Cth.), s. 69ZN(3) [*Family Law Act 1975*]. This statute has two other child-focused procedural principles that have no analogue in Ontario's *Family Law Rules*, *supra* note 71. Section 69ZN(5)(a) provides that "the proceedings are to be conducted in a way that will safeguard ... the child concerned against family violence, child abuse and child neglect." Section 69ZN(6) states that "the proceedings are, as far as possible, to be conducted in a way that will promote cooperative and child focused parenting by the parties."

198. *Family Law Rules*, *ibid.*, s. 2.

i. WHETHER LITIGATION OCCURS

Whether a procedural step occurs is a question that judges should answer in light of the probable costs and benefits thereof to the child. The status quo allows litigation to occur or continue even when its likely benefits for children do not exceed its likely costs. This is certainly true with regard to the most extreme cases, such as those described above.¹⁹⁹ Apart from the endless sagas of the high-conflict repeat litigators, this may also be true with regard to the more trivial variation motions. For example, consider a motion to vary access. Assuming that the access arrangement sought by the moving party is better for the child, assuming that the court reaches this conclusion, and assuming that the new order is obeyed, it is still entirely possible that the deleterious impact on the child's financial security brought about by the parents' expenditures on lawyers (and, perhaps, expert witnesses) to argue the motion will outweigh the benefit of the change. The non-financial costs to children outlined above make it even less likely that a motion to vary access will have a *net* benefit for the child.

The mechanisms currently available for curtailing litigation might be strengthened to prevent litigation of this nature. Rule 2(5)(e) obliges the court to consider the benefits and costs of a procedural step before allowing it to occur. This should also be amended to explicitly require consideration of the benefits and costs of a proposed step *to any children involved*. Second, "vexatious proceedings" should have a special definition in the context of custody and access litigation—proceedings whose expected benefits for the child or children involved do not exceed their costs. Such proceedings could be made subject to the remedy available in section 140 of the *Courts of Justice Act*.²⁰⁰ Judges might be given the power they possess in Australia: to make such an order on the court's initiative even if no party has sought it.²⁰¹

As observed above, courts are reluctant to make parenting orders about older adolescents due to the likelihood that they will simply "vote with their feet."²⁰² The CLRA affirms "the right of a child of sixteen or more years of age to withdraw from parental control."²⁰³ However, the applicable legislation continues to allow

199. See Part II(C), above.

200. *Supra* note 112, s. 140.

201. *Family Law Act 1975*, *supra* note 197, s. 69ZP.

202. Davies, *supra* note 124.

203. *Children's Law Reform Act*, *supra* note 3, s. 65.

custody and access orders to be sought for these children.²⁰⁴ Given that orders of this nature are less likely to be granted, and are perhaps legally unenforceable if they are granted, does allowing parents to seek them create net benefits for the children involved? Or should the legislature close the door on parenting orders for older adolescents in order to save them from the procedural costs of litigation that is unlikely to do them much good?

ii. HOW THE LITIGATION IS CONDUCTED

Once it is determined that a step in the procedure should occur, ideally the *way* in which that step proceeds should be determined in light of the cost-benefit calculus for the child. Reforms to parenting litigation procedure may demonstrably reduce its costs to the children involved, without equivalent reductions in its benefits. Here, too, Australia is a leader. A pilot Children's Cases Program was launched in 2004 in Sydney-area family courts.²⁰⁵ In addition to substantial efforts to encourage voluntary settlement, this initiative also modified trial procedure itself. For example, the judge was given substantial power to limit the evidence put forward by the parties.²⁰⁶ A subsequent evaluation, which compared this pilot project to the mainstream court system, found that those involved in the pilot program reported "better management of conflict, less damage to the co-parental relationship, greater satisfaction of parents and children with their living arrangements, and, in association with these, improved children's adjustment."²⁰⁷

Imposing higher procedural costs on children may be justified in some parenting cases but not in others, depending on what benefits the child stands to gain from the procedure. For example, suppose Pat and Cameron are seeking a divorce. They are more or less evenly matched in terms of their ability to parent their child Jane. Suppose further that joint custody is not an option in this case, due to the

204. *Ibid.*, s. 18(2); *Divorce Act*, *supra* note 5, s. 2(1).

205. Stephen O'Ryan, "A Significantly Less Adversarial Approach: The Family Court of Australia's Children's Cases Program" (Paper presented to the 22nd Australian Institute of Judicial Administration Conference, Wellington, New Zealand, 18 September 2004), online: <<http://www.aija.org.au/ac04/papers/ORyan.pdf>>. It was subsequently renamed the "Less Adversarial Trial" program. See Jennifer E. McIntosh, Diana Bryant & Kristen Murray, "Evidence of a Different Nature: The Child-Responsive and Less Adversarial Initiatives of the Family Court of Australia" (2008) 46 *Fam. Ct. Rev.* 125 at 126.

206. Alastair Nicholson, *Practice Direction No. 2 of 2004: The Children's Cases Program*, 1 March 2004 (Sydney: Family Court of Australia); O'Ryan, *ibid.* at 21.

207. McIntosh, Bryant & Murray, *supra* note 205 at 130.

level of hostility between Pat and Cameron.²⁰⁸ The available options with regard to the custody decision are therefore either sole custody to Pat or sole custody to Cameron. The non-custodial parent will have liberal access rights.

Legally, the correct decision between these options is that which is most consonant with Jane's best interests. However, the benefits to Jane from reaching the correct decision are modest. The correct decision does not mean permanently placing Jane with a fantastic parent and saving her from the custody of an awful parent. It means only that the slightly better parent will have custody, whereas the other will have generous access. In this case, the procedure most consonant with BIC will be a brief and summary one that involves relatively little cost to the parties and relatively little procedural trauma for Jane, even if this procedure runs a higher chance of reaching the wrong conclusion.

Conversely, a procedure with higher costs would be appropriate when the stakes are higher for Jane. For example, suppose Pat and Cameron are seeking a divorce on consent, incorporating minutes of settlement whereby Pat is to have sole custody of Jane. However, the court has reason to believe that Cameron would be a far superior parent, and only reluctantly agreed to the custody arrangement. Cameron is in a weaker financial position than Pat, and is afraid of being bankrupted by legal fees if the case proceeds to litigation. The settlement offer whereby Pat receives sole custody also includes a spousal support term that Cameron desperately needs. In this case, the procedure most consonant with BIC will be more lengthy and costly for the child Jane. Despite its costs to her, litigation might be most consonant with BIC in this case, insofar as it will prevent Jane from ending up in Pat's custody. However, what would actually happen in this case would be no procedure whatsoever, insofar as the parties have reached a consensual arrangement.

Amending the procedure depending on the cost-benefit calculus in a given case is not so simple as merely deciding to curtail litigation. However, precedents exist in Ontario civil procedure, which, for example, direct cases to Small Claims Court, simplified procedure, or regular procedure depending on the monetary value of the claim. This reflects the general policy of proportionality—that the nature of the proceeding should befit the significance of the claim. Proportionality is now an explicit interpretive principle in Ontario's *Rules of Civil Procedure*,

208. See e.g. *Kaplanis v. Kaplanis* (2005), 249 D.L.R. (4th) 620 (Ont. C.A.).

which provide that “the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.”²⁰⁹

The proportionality principle is more difficult to apply to custody and access litigation because it is difficult to evaluate the significance of a proceeding to a given child, especially before it is adjudicated. Monetary value is not available as a ready proxy for significance. Further research might develop rules of thumb about what types of custody and access claims are most likely to produce more or less substantial benefits for the children involved, and might develop techniques to tailor the procedure depending on the type of claim.²¹⁰

iii. WHETHER CHILDREN’S EVIDENCE IS HEARD

It is natural and inevitable that parents’ evidence should be prominent in a procedure focused on the interests of their child. They usually know the child better than anyone else does, and their personal inclinations and characteristics are also important, given that they will be the agents of whatever order is ultimately made. However, this does not justify the apparent absence of children’s evidence from most custody and access cases. I will suggest here that including it would do more good than harm for the children involved, and that training and encouraging judges to interview children appears to be the most practical means of doing so, given resource constraints.

This article has reviewed empirical findings about the types of evidence that are usually available in custody and access litigation.²¹¹ The available data suggest that the majority of judicial custody and access decisions are made without any form of children’s evidence, if that term is defined to include evidence which comes directly from the child or from a neutral professional with child-related expertise. Direct evidence from children may easily have more costs than benefits for them.

209. R.R.O. 1990, Reg. 194, s. 1.04(1.1).

210. Efforts are being made to develop differentiated case management (or “triage”) protocols, whereby cases are streamed to different services and dispute-resolution approaches depending on their characteristics. See Nancy Ver Steegh, “Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process” (2008) 42 Fam. L.Q. 659; Peter Salem, “The Emergence of Triage in Family Court Services: The Beginning of the End for Mandatory Mediation?” (2009) 47 Fam. Ct. Rev. 371.

211. See Part II(B), above.

However, most scholars agree that there are ways to involve children that provide net benefits, both by improving the quality of the outcome and by giving children the psychologically beneficial sense that they have been consulted in these decisions which intimately involve them.²¹² The *United Nations Convention on the Rights of the Child* also speaks to this point, in Article 12:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.²¹³

The “gold standard” for children’s evidence may very well be the assessment or interview of the child conducted by an independent lawyer, social worker, or mental health professional with specific expertise and training. However, resource constraints usually make this impossible. Most parents cannot afford to retain psychologists or social workers to conduct assessments. In Ontario, many of them turn to the OCL, which provides legal representation to children and social worker investigations akin to assessments without charge. At one time, the OCL’s predecessor was notified of all Ontario divorces involving minor children,²¹⁴ and publicly funded investigations were mandatory in every divorce case before 1987.²¹⁵ However, funding did not keep pace with the increasing prevalence of custody and access litigation over the second half of the twentieth century.²¹⁶

212. See e.g. Rachel Birnbaum & Nicholas Bala, “The Child’s Perspective on Representation: Young Adults Report on Their Experiences with Child Lawyers” (2009) Can. J. Fam. L. 11 at 40 [Birnbaum & Bala, “Child’s Perspective”]; Coley, *supra* note 16.

213. *UNCRC*, *supra* note 13, art. 12.

214. Rachel Birnbaum & Dena Moyal, “How Social Workers and Lawyers Collaborate to Promote Resolutions in the Interests of Children: The Interface between Law in Theory and Law in Action” (2003) 21 Can. Fam. L.Q. 379 at 383.

215. Kevin Marron, “Child rule changed: checks on divorces no longer required” *The Globe and Mail* (11 February 1987) A11.

216. The same seems to be true further west. Regarding Alberta, see Davies, *supra* note 124 at 170; Dale Hensley, “Role and Responsibilities of Counsel for the Child in Alberta: A Practitioner’s Perspective and a Response to Professor Bala” (2005) 43 Alta. L. Rev. 871 at 875-76; and Bala, “Child Representation in Alberta,” *supra* note 163 at 847. Regarding

Today, the OCL declines approximately half of the requests for its involvement in custody and access cases. A 2007 study found that the OCL was involved in only 9 per cent of those cases in Ontario's unified family courts in which the applicant and/or respondent had children.²¹⁷

There are and will continue to be a large group of cases in which it would not be in the child's interest to be heard directly and resources do not permit a neutral child expert to speak to and for the child. In such cases, the judicial interview is an obvious mechanism by which children's evidence can be heard. Such interviews are authorized by section 64(2) of Ontario's CLRA,²¹⁸ by statutes in four other provinces, and by case law in the rest of the country.²¹⁹ However, they are rare in practice. The author's empirical research did not find a single reference to a judicial interview of a child in a sample of 181 reported custody and access cases.²²⁰ Bala and Birnbaum recently interviewed Ontario judges and found widespread reluctance to interview children.²²¹

In other jurisdictions, such as Ohio, judicial interviews of children in custody and access litigation are common.²²² It is possible that their scarcity in Canada reflects not a conclusion on the part of judges that interviews invariably do more harm than good to the children, but rather a discomfort or unfamiliarity with this function. Interviewing is a form of active evidence gathering, and as such it is a departure from the traditional judicial role. However, it is difficult to believe that, in a dispute that is focused entirely on a child and his or her future, the child

British Columbia, see Ministry of Attorney General (B.C.), *Family Relations Act Review Discussion Paper* (Justice Services Branch—Civil and Family Law Policy Office, 2007) at c. 8, "Children's Participation," 9-10. Regarding Manitoba, see the recent case of *Poste v. Mitchell-Poste* (2009), 242 Man. R. (2d) 310 at para. 51 (Q.B. (Fam. Div.)). In *Poste*, the judge ordered an assessment but stated that he was "mindful of the delay which will ensue given the backlog of outstanding assessments at Family Conciliation Services."

217. Mamo, Jaffe & Chiodo, *supra* note 169 at 82.

218. *Children's Law Reform Act*, *supra* note 3, s. 64(2).

219. Birnbaum & Bala, "Child's Perspective," *supra* note 212.

220. Semple, "The Silent Child," *supra* note 74.

221. Rachel Birnbaum & Nicholas Bala, "Judicial Interviews with Children in Custody and Access Cases: Comparing Experiences in Ontario and Ohio" (2010) 24 Int'l J.L. Pol'y & Fam. [forthcoming] [Birnbaum & Bala, "Judicial Interviews"].

222. Denise Herman McColley, "Ohio Statutory and Case Law on Interviewing Children" in *Family Law—The Voice of the Child*, 5 March 2009 (Toronto: Law Society of Upper Canada, 2009) 2a-5; Birnbaum & Bala, "Judicial Interviews," *ibid.*

should have no involvement whatsoever when resources do not allow for a dedicated neutral professional to assist. If further research supports the conclusion that judicial interviews are under-utilized in custody and access cases, then judges should be trained and encouraged to deploy this tool more often.²²³

Judicial interviews are certainly not always appropriate, most obviously if the child is too young to provide meaningful information. They may also pose some of the same risks for the child as *viva voce* courtroom testimony. The OCL's Dan Goldberg draws a distinction between a judicial "preference interview" (in which the child is asked more or less directly which outcome he or she would choose) and a judicial "conversation" with a child.²²⁴ He argues that the latter, which may focus more on getting to know the child or explaining the process, is substantially less dangerous. This type of interview may skirt the pitfalls while capturing most of the therapeutic and evidentiary advantages of including children's voices that have been identified in the literature.²²⁵

IV. CONCLUSION

There is a fundamental contradiction in our approach to custody and access disputes. The statutes, case law, and scholarship all clearly proclaim that the best interests of the child are the only relevant consideration. This distinctive legal standard renders the parties' claims and needs irrelevant as ends in themselves. However, the procedure by which we resolve disputes about parenting embodies the opposite philosophy. As in all civil litigation, the parties have a great deal of control over the process. While children's evidence is a component of our system and while the material change threshold does effectively prevent some litigation which is not in children's interests, these are exceptions to the general rule: a procedure which empowers the adult parties. One obvious way to reconcile the inconsistency would be legal reform to recognize parents' interests in the outcome.

223. See *G. (L.E.) v. G. (A.)*, 2002 BCSC 1455. Martinson J. concluded that judges have the authority to interview children, and that in some circumstances doing so may be in their interests.

224. Dan L. Goldberg, "Judicial Interviews of Children in Custody and Access Cases: Time to Pause and Reflect" in *Family Law—The Voice of the Child*, 10 March 2010 (Toronto: Law Society of Upper Canada, 2010) 7-1.

225. See e.g. Birnbaum & Bala, "Child's Perspective," *supra* note 212; Coley, *supra* note 16; and Birnbaum & Bala, "Judicial Interviews," *supra* note 221.

The more challenging, but—to the author—the more just resolution to the contradiction is to reform the procedure to give children's interests the same priority that they have in the law. The present article has only begun to sketch out the dimensions of this task. The task calls, first, for an accounting of the costs and benefits of different types of custody and access litigation for different types of children. Then, we must find ways to ensure that every custody and access dispute is resolved with the maximum possible *net benefits* for the child or children involved. Only after this endeavour is complete can we as a society pledge our allegiance, without hypocrisy, to the best interests of the children involved in custody and access disputes.